PROCEEDINGS

OF THE

American Society of International Law

AT ITS

TWENTIETH ANNUAL MEETING

HELD AT

WASHINGTON, D. C.

APRIL 22-24, 1926

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Saturday, April 24, 1926, at 10 o'clock a. m.

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Saturday, April 24, 1926, at 7.30 o'clock p. m.

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FOR THE YEAR 1926–27

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CONSTITUTION

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW[1]

(Revision of April 25, 1925)

ARTICLE I

Name

This Society shall be known as the American Society of International Law.

ARTICLE II

Object

The object of this Society is to foster the study of International Law and promote the establishment of international relations on the basis of law and justice. For this purpose it will coöperate with other societies in this and other countries having the same object.

ARTICLE III

Membership

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the *American Journal of International Law* issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Upon payment of one hundred dollars any person otherwise entitled to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause for which this Society is formed to promote, may be elected to

[1] The history of the origin and organization of the American Society of International Law can be found in the Proceedings of the First Annual Meeting at p. 23. The Constitution was adopted January 12, 1906.

honorary membership at any meeting of the Society on the recommendation of the Executive Council. Honorary members shall have all the privileges of membership, but shall be exempt from the payment of dues.

Article IV

Officers

The officers of the Society shall consist of a President, an Honorary President, three Vice-Presidents, such number of Honorary Vice-Presidents as may be fixed from time to time by the Executive Council, a Recording Secretary, a Corresponding Secretary, and a Treasurer, all of whom shall be elected annually, and of an Executive Council composed of the foregoing officers, *ex officio*, and twenty-four elected members, whose terms of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen. No elected member of the Executive Council shall be eligible for reëlection until the next annual meeting after that at which his term of office expires.

The Recording Secretary, the Corresponding Secretary and the Treasurer shall be elected by the Executive Council. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee, which shall consist of the five members of the Society receiving the highest number of ballots cast by the members at the first session of the Annual Meeting of the Society. The Executive Council may submit a list of nominees.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

Article V

Duties of Officers

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council, or by vote of the Society.

2. The Secretaries shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to them.

3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programs therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairmen, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman, who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

Article VI

Meetings

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

Article VII

Resolutions

All resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

Article VIII

Amendments

This Constitution may be amended at any annual meeting of the Society by a two-thirds vote of the members present and voting. Amendments to the Constitution may be proposed by the Council, or by a communication in writing signed by at least five members of the Society and deposited with the Recording Secretary within ten months after the previous annual meeting, and any amendments so deposited shall be reported upon by the Council at the succeeding annual meeting. All proposed amendments shall be submitted in writing to the members of the Society at least ten days before the meeting at which they are to be voted upon and no amendment shall be voted upon until the Council shall have made a report thereon to the Society.

REGULATIONS OF THE EXECUTIVE COUNCIL REGARDING THE EDITING AND PUBLICATION OF THE AMERICAN JOURNAL OF INTERNATIONAL LAW

Adopted May 22, 1924

1. There shall be a Board of Editors charged with the general supervision of editing the *American Journal of International Law* and determining general matters of policy in relation thereto.

2. The Board shall consist of not to exceed seventeen members to be elected annually by the Executive Council.[1]

3. Membership upon the Board of Editors shall involve, in addition to the duties otherwise prescribed herein, obtaining articles and other material for publication, the preparation of contributions, especially editorial comments and book reviews, and the examination of and giving advice upon the suitability for publication of articles prepared by non-members of the Board.

4. There may be an Honorary Editor-in-Chief elected by the Council; and there shall be an Editor-in-Chief and a Managing Editor to be elected annually from among the members of the Board by the Executive Council, and to serve until their successors assume office.

The Editor-in-Chief shall call and preside at all meetings of the Board of Editors, and when the Board is not in session he shall determine matters of policy regarding the contents of the *Journal*.

The Managing Editor shall have charge of the publication of the *Journal*, shall receive contributions and other material for publication, including books for review, and conduct the correspondence regarding the same.

In the event of the temporary inability of the Editor-in-Chief to serve, his duties shall be performed by the Managing Editor, unless the Editor-in-Chief shall designate an acting Editor-in-Chief.

5. The *Journal* shall be made up of leading articles, editorial comments, a chronicle of international events, a list of public documents relating to international law, judicial decisions involving questions of international law, book reviews and notes, a list of periodical literature relating to international law, and a supplement.

(a) Before publication all articles shall receive the approval of two members of the Board. In case an article is rejected by one editor, the question of its submission to another editor shall be decided by the Editor-in-Chief. Articles by members of the Board of Editors shall be submitted to the Editor-in-Chief, who shall decide as to their publication.

(b) Editorial comments must be written and signed by the members of the Board of Editors, and shall be published without submission to any other editor, except that they shall be governed by the provisions of Paragraph 6 hereof. Current notes of international events, containing no com-

[1] As amended April 24, 1926.

ment, may be printed over the signatures of non-members of the Board of Editors in the discretion of the Managing Editor.

(c) In the department of judicial decisions, preference in publication shall be given to the texts of decisions of international courts and arbitral awards which are not printed in a regular series of publications available for public distribution. This department may also contain the texts of decisions of the Supreme Court of the United States and the highest courts of other nations involving important questions of international law. Comments upon court decisions, either those printed in the *Journal*, or those not of sufficient importance to print textually, may be supplied by members of the Board of Editors, and shall be printed as editorial comments or current notes.

(d) The chronicle of international events, and the lists of public documents relating to international law and periodical literature of international law, shall be prepared under the direction of the Managing Editor.

(e) The supplement shall be made up of the texts of important treaties and other official documents. Material for it shall be supplied by the Managing Editor, taking into consideration such suggestions from the members of the Board as they may have to offer from time to time.

6. The final make-up of each number of the *Journal* shall be submitted by the Managing Editor to the Editor-in-Chief, who shall have the power to veto the publication of any contribution or other material. In the absence of such a veto, the Managing Editor shall be authorized to publish the *Journal*, using approved material so far as approval is prescribed herein.

7. The *Journal* shall be published upon the 15th days of January, April, July and October, or as near to those dates as possible, and the Managing Editor shall have power to proceed with the publication of the *Journal* from the materials in his hand upon the first day of the month preceding the month of publication.

8. The Managing Editor shall receive such compensation for his services, and such allowance for clerical assistance, as may be fixed by the Executive Council.

TWENTIETH ANNUAL MEETING

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW

THE NEW WILLARD HOTEL

APRIL 22–24, 1926

FIRST SESSION

Thursday, April 22, 1926, at 8.30 o'clock p. m.

The Twentieth Annual Meeting of the American Society of International Law was called to order at 8.30 o'clock p. m., at the New Willard Hotel, Washington, D. C., by the President, Honorable Charles Evans Hughes.

The PRESIDENT. Members of the Society, ladies and gentlemen: I am sure you would have me, at the very beginning of our session, express the pleasure which we all have in welcoming here one of the most eminent of international jurists, Dr. Antonio S. de Bustamante, of Cuba, eminent not only for his learning, but as one who has rendered and is rendering most distinguished service as a member of the Permanent Court of International Justice. He has honored us in accepting our invitation to address the Society, and we shall have the pleasure of hearing him tomorrow evening.

In discharging the responsibility which falls upon me to introduce the proceedings, I shall venture upon some observations on recent events.

SOME OBSERVATIONS ON RECENT EVENTS

ADDRESS BY CHARLES E. HUGHES

President of the Society

During the past year, the optimists and the pessimists have each had their day. In October and December, the world was hailing the dawn of a new era. But, within a few months, the general impression seemed to be that we had suffered from an optical illusion, that the old era was still with us, that the light had failed and darkness had settled upon the face of the deep.

To those who in this Society hold an attitude of philosophical detachment, neither looking for the millennium nor taking counsel of despair, it would appear that there are indications of substantial progress toward the establishment of the essential conditions of enduring peace. To some, the most important of these indications will be found in economic adjustments, because of the conviction that it is idle to expect good will, and the peace that depends upon it, unless it has an economic basis. Sound settlements permitting economic recuperation are indispensable, for with our human nature

which is the product of eons of struggle and strife, the urge of the right to live and to enjoy the fruits of industry will make peace formulas but barren idealities if there is strength enough to win the coveted opportunity. It is the disposition to make such settlements that furnishes the test of the will to peace. The London Conference of 1924 making it possible to put into effect the Dawes Plan, marked a new mental attitude,—the beginning of the reign of reason after a long period of insanity. Other economic arrangements, if they could be devised for troubled areas, would do more than anything else to dispose peoples to stop thinking in terms of war. If some of the expert men of affairs, in a world full of expertness too little used, could have a chance, with the necessary acquiescence of the politicians, to deal with economic necessities, prospects would be brighter.

"What"—once said to me a distinguished foreign statesman, eminent for his services in the cause of peace, "do your people mean by the outlawry of war?" It was not an easy question to answer,—for I am not sure that those who talked most glibly of the outlawry of war knew precisely what they meant. The vision was too dazzling to permit distinct perception of details. It may be that they thought of the nations convening in conference and declaring that war should be illegal, with proper exceptions, of course, not easily admitting of accurate definition. Or, that there should be war to prevent war, the dream that Great Powers, forgetting all diverse interests, by unity of purpose and by an iron and pervasive rule should enforce peace by the exertion of their common strength.

However, the most significant fact in recent history is the serious attempt that has been made to make the vision real by practical schemes to prevent war,—by plans which are induced by the conviction of the futility of reliance upon individual strength, upon alliances, upon competitive arms, —of the need of creating a sense of security by the assumption of collective responsibility. We watch with the deepest solicitude the progress of these undertakings.

May I recall the words of Lord Grey:

> The lesson of European history is so plain. It is that no enduring security can be found in competing armaments and in separate alliances; there is no security for any Power unless it be a security in which its neighbors have an equal share. . . . It is necessary therefore that, by common consent, war should be avoided. Can it be avoided, and if so what are the means to that end? The most effective change would be that nations should dislike each other a little less, and like each other a little more; but this aspect takes us into regions of moral or religious speculation. Nations cannot help disliking what they do not understand. Yet it should be possible for them, after the last war, to find at least one common ground on which they should come together in confident understanding; an agreement that, in disputes between them, war must be ruled out as a means of settlement that entails ruin; that between nations, as between individuals, the risk involved in settlement by law or arbitration is preferable to the disaster of force.

But here, an inescapable difficulty is presented. The desire for peace, the conviction that collective responsibility must be assumed, has not reached the point where states are ready to undertake obligations which are not perceived to be commensurate with their interests. Obligations may indeed be undertaken, if they are not regarded as real, or they may be assumed by states which feel that they will not be called upon for performance contrary to interest. If regarded as real, the engagement must be found to be demanded by a dominant conception of national interest or it will be declined. Without entering into an old controversy, it would seem to be clear that the United States would have joined in the Covenant of the League of Nations, if prevailing opinion had not taken seriously certain commitments of the Covenant which it was found could neither be explained away as mere forms of words or be accepted by the Government of the United States as requiring its action in unknown contingencies and in relation to controversies to which it might not be directly related. These general commitments thus had the disadvantage of giving rise to apprehensions on the part of some, while failing to satisfy the requirements of others who sought more definite guarantees of security.

When the Treaty of Guaranty proposed for the United States, Great Britain and France failed, and the later proposal for a Treaty of Mutual Assistance fell through, the effort was made to find a satisfactory general guaranty in the Geneva Protocol. As Dr. Benes, the brilliant foreign secretary of the Czechoslovakian Republic has said:

> A number of delegates at Geneva rightly believed that the League of Nations Covenant in reality contains in germ everything; the principle of the peaceful settlement of international conflicts, guarantees of security, and, finally, the principles of the limitation of armament. They believed it sufficient simply to supplement it where gaps remained. The main principle of the Protocol was the prohibition of an aggressive war and of war in general, whereas by the League of Nations Covenant the sovereign right of states to wage war against one another is limited, but not entirely removed; in addition to prohibited wars there are legal wars and also wars which are suffered. A second main principle of the Protocol logically supplementing the first principle, was that every international dispute which might give rise to armed hostilities must unconditionally be submitted to peaceful settlement.

The progress made in the application of these principles was through the endeavor to solve the problem of defining aggression by the postulate that the criterion should be found in refusal to resort to the institutions of peaceful adjustment and to abide by the determinations which might result.

While this ambitious and comprehensive plan was apparently accepted in September, 1924, by those then interested, "with sincerity and enthusiasm" it came to grief in a few months. It was too comprehensive; its obligations were too sweeping. They menaced those who were not parties and

were found to be incompatible with the dominant interests of a great Power whose coöperation was essential. The obvious lesson was that a settlement of the urgent problem had been postponed by insistence upon a more inclusive arrangement than the nations were ready to make, and that the most pressing question of security in Western Europe should be taken up directly by the Powers immediately concerned. Thus, Locarno became possible.

It had also become manifest that if the League of Nations was to be efficient, as all must desire it to be, as an instrument for the promotion of European peace, Germany should become a member upon a footing of equality with that of the other great states. The Powers, meeting at Locarno, by virtue of their realization of the dominant interest of each in effecting a settlement, and directing their endeavors to an end desired by all, were able to formulate a unique series of agreements. When it came to the point of carrying out these agreements, however, it was apparent that while the formula promised well, it was thought best to have a little "collateral security" and that the idea of protection through balance of power, instead of being discarded, was still a controlling conception. Moreover, it was again demonstrated that it is not conducive to the making of necessary adjustments to have these arrangements depend upon the consent of other Powers not having the same problems and not facing the same exigencies. There is no need to disparage the motive or sincerity of any Power in its efforts to protect its own interests, but the fact remains that interest determines national action and that the common action of states inevitably depends upon their appreciation of community of interest. No international organization can escape the dominant motives of national policy. When the sense of common interest is lacking the best laid international plans are destined to failure. Regional undertakings, or those addressed to particular exigencies and motivated by the desire of the Powers directly concerned in order to solve a common problem, hold the best promise of success.

The striking and unique feature of the Locarno Treaties—and we trust that the difficulty disclosed in Geneva will soon be overcome—lies in the recorded purpose and agreement of great Powers to settle *all* controversies between them without resort to war and to provide practical substitutes for war. This, if made effective, will be the crowning triumph of all peace efforts —a triumph attested not by the delusive provisions of resolutions or the propaganda of peace organizations, but by the deliberate engagements of governments. Let it be remembered that in the twenty-five years preceding the Great War the advocates of peace had apparently reached the zenith of their efforts. The imperial rescript of the Czar, in its noble expressions and its summons to a Conference for the Limitation of Armaments, seemed to promise fruition after many years of intensive organized effort. But this was only to the superficial observer. The conditions beneath the surface were opposed to success. I may recall the words of Andrew D. White, who represented the United States at the First Hague Conference:

> When the nations got together at The Hague to carry out the Czar's supposed purpose, it was found that all was haphazard; that no adequate studies had been made; no project prepared, in fact that the Emperor's government had virtually done nothing showing any real intention to set a proper example.

Count Mùnster was found to be entirely opposed to arbitration, or at least to any well-developed plan. He was wont to insist, we are told, that the conference was a mere trick to embarrass Germany and to gain time against her rivals who kept up better military preparations. Despite the splendid call for limitation of armament, the result of the First Hague Conference went no further than the adoption of a pious wish that governments "may examine the possibility of an agreement as to limitation of armed forces by land and sea and of war budgets." Despite this, so significant in retrospect, and lest we should now be too optimistic, I should refer to Mr. White's own estimate intended to be conservative, of what the Conference of 1899 achieved. Said he: "The first of these (achievements) is the plan of arbitration. It provides a court definitely constituted; a place of meeting easily accessible; a council for summoning it always in session; guarantees for perfect independence and a suitable procedure." Closely connected with this, he said, was the provision for "international commissions of inquiry, which cannot fail to do much in clearing up issues likely to lead to war between nations." So, too, "the plans adopted for mediation can hardly fail to aid in keeping off war." And he found added comfort in the wishes for "continued study and persevering effort to make the instrumentalities of war less cruel and destructive." Sincere observations, which now seem almost ironical!

Scarcely, as Mr. Choate later observed, had the ink dried on the pens of the delegates who signed the final act of the conference, when the war broke out between Great Britain and the Transvaal. This was followed by the still more terrible war of 1904 between Russia and Japan. After this was ended, the Second Peace Conference at The Hague was undertaken. The time was propitious. It met, says Mr. Choate, at a moment of profound universal peace, which was a good augury of its work and for the first time in history there was a conference of all the civilized nations. As a result it was declared by a most eminent statesman that the belief was justified "that the world has entered upon an orderly process, through which step by step in successive conferences there may be continual progress toward making the practice of civilized nations conform to their peaceful professions." And, five years later, Mr. Choate could say, in referring to the erection of the Palace of Peace at The Hague—"And so at last after a lapse of three centuries will be realized the dream of Grotius, the founder of international law, that all the civilized nations of the earth will submit to its dictates whether in war or in peace." And now, he added (in 1912) "that we are about to celebrate the completion of a century of unbroken peace between ourselves and all the other great nations of the earth, and are also on the eve of pre-

paring for a Third Conference at The Hague, we may join with them in wishing a hearty Godspeed to that conference and all its successors forever."

That conference is still to be held and in its place we entered upon the greatest war in all history.

We do well to pause to reflect upon these prophecies of the most astute of our statesmen before we lightly talk of the prospects of peace.

But, after all there are points not to be overlooked. At the Second Hague Conference the nations were unable to provide a satisfactory basis for a permanent court of international justice. They got along very well until it came to the judges. But a court requires judges, and these they could not supply. In 1907, the nations were not ready for a Locarno. It required a great war to convince peoples of the futility of war; to demonstrate that overpowering national ambition leads to overwhelming disaster; that security does not lie in heaping up arms; that if the war is great enough and long enough, victory means defeat, and that dictating terms of peace is poor compensation for devastated territory, decimated population and an intolerable burden of indebtedness; that schemes for reparation payments depend finally upon ability to pay; that a victorious war is not worth its cost. The Locarno spirit is not so much evidence of the triumph of optimism as a revelation of disillusionment. If peoples have really become convinced that war and preparation for war are poor business, we may hope for peace, provided a sense of security can be created and maintained and disputes find processes of peaceful adjustment. Peace cannot be established by force, if those who are to supply the forces fall out among themselves. National interests will remain diverse; sensitiveness to national wrongs will still exist; the desire to change conditions when these are believed to be unjust, cannot be repressed; the causes of strife will continue to operate and the processes of peace will inevitably fail if there is not a profound conviction that war is not worth while. Even with this conviction, the test of agreements for peace must be found not simply in aspirations but in the practicality of the substitutes and preventives of war, and it is in the institutions of peace that have been set up and are in contemplation, and particularly in the promise of the conservation, the application and the development of the law of nations, that our interest centers.

A series of agreements, with the undertaking to submit to judicial decision any question with regard to which the parties are in conflict as to their respective rights, and which it may not be possible to settle by the normal methods of diplomacy, and to comply with such a decision, would be but a frail reliance, if dependence were merely upon such arbitral tribunals as might be called into existence after the controversy had arisen. The observations of Lord Salisbury are apposite:

> If the matter in controversy is important, so that defeat is a serious blow to the credit or the power of the litigant who is worsted, that interest becomes a more or less keen partisanship. According to their

> sympathies men wish for the victory of one side or another. Such conflicting sympathies interfered most formidably with the choice of an impartial arbitrator. It would be invidious to specify the various forms of bias by which in any important controversy between two great Powers, the other members of the commonwealth of nations are visibly affected. In the existing condition of international sentiment each great Power could point to nations whose admission to any jury, by whom its interests were to be tried, it would be bound to challenge; and in a litigation between two great Powers, the rival challenges would pretty well exhaust the catalogue of nations from which competent and suitable arbitrators could be drawn. It would be easy, but scarcely decorous, to illustrate this statement by examples.

This is the difficulty which stands in the way of unrestricted arbitration, especially where great Powers are concerned whose differences are likely to engage the interests and sympathies of other Powers.

What is the remedy? The alternative to war, where agreement has been found impossible, is in some sort of arbitral settlement. But nations cannot be arbiters in their own cases, and no arbitral arrangement can escape the imperfections which inhere in human nature. Obviously the best thing that can be done is to select the judges before the controversy arises; to choose them for their preëminence in learning, their approved characters, their impartiality; to set them aside with a secure tenure; to immunize them so far as possible by the dignity and continuity of their office from the prejudices and preoccupations of politicians; gradually to promote confidence in their decisions by the observation of their judicial practice; in short, to establish under the best practicable safeguards a permanent court. Such an institution has at last been set up and it holds the promise of the security of rights.

Too much should not be expected of it. In our own country, in response to an imperative exigency, we established the Supreme Court. Suppose our constitution had committed the States to the establishment of temporary arbitral tribunals, when controversies arose as to the rights of the States, as to the boundaries of State and National power, what a mess we should have made of it! Of necessity, we established a permanent tribunal, but even with our intimacy of relations, the sense of nationai solidarity now thoroughly established, the common principles of our jurisprudence, a considerable part of our people have always made it their business to deride the administration of justice, to find fault with particular decisions, to talk of judicial usurpation. The marvel is that there has been so little to criticize and that, notwithstanding all objurgations, by far the greater part of our people have confidence in our Supreme Court and that many regard it as the most satisfactory feature of our system of government. This appreciation is due to the spectacle constantly before us of judges with life tenure, having no inducement but to give impartial judgments according to their conscience. The court is a human institution, relatively weak—as strong things are

measured—having neither purse nor sword, but the quality and spirit of its work has made it impregnable. It is to be hoped that the experience of the nations will breed a similar confidence in the Permanent Court of International Justice. Not that we may expect universal approval of its decisions, but that it will stand forth as the exemplar of the impartial application of the principles of international law and be demonstrably free of the blighting touch of politics.

The Locarno agreements would not help much if experience with the court should destroy confidence in judicial settlement, but with the states, who are supporting the court, mutually watchful of the choice of judges, careful to protect the exercise of judicial functions from solicitations or extrajudicial demands, understanding fully that there is no better method available for determining a question of right, we may look forward to success in this most important international experiment. The essential institution of peace is the permanent court.

But Locarno did not stop with questions of right. Its treaties also entered the difficult field of controversies which do not arise out of questions of right but which involve conflicts of interests and political disputes, and provide for the submission of such controversies, where they cannot be settled by diplomacy, to a conciliation commission. This plan takes us back to the provision for commissions of inquiry under the Hague Conventions and to the so-called Bryan treaties. But these commissions were only to make inquiries, to ascertain the facts and report. The hope of success was in an informed public opinion. Later conventions, notably the Santiago Convention of 1923, have provided for recommendations of solutions and adjustments. In the Locarno agreements, the Permanent Conciliation Commission is to investigate and to propose to the parties an acceptable solution, and in any case to present a report. If the parties have not reached an agreement within a stated period after the termination of the labors of the commission, the question at the request of either party is to be brought before the Council of the League, which shall deal with it in accordance with Article 15 of the Covenant.

As conciliators are to deal with questions of interest and policy, as their office is to be invoked from time to time as required, they cannot have the advantage of the judicial tradition established by a court constantly at work within the limits of commonly accepted principles. When problems arise out of political considerations, it will be political considerations that will determine the nature of proffered solutions and their acceptability. The difficulties increase with the gravity of the exigency. Machinery which may serve when concerns of the smaller Powers are involved may fail to work when great Powers are in antagonism. If the conciliators are deemed to represent governments, what Lord Salisbury said, in what I have quoted above, as to the choice of arbitrators applies to an even greater degree to the selection and to the success of conciliators who are not to decide rights but to

adjust interests. In any grave controversy between great Powers, the other members of the community of nations are likely to be affected and to intrude views of their own policies into a situation already serious. If conciliators are to be chosen as individuals, it may be difficult to find men of the desired prestige and independence. It is deemed to be important that conciliators should be selected in advance of the controversy, but if they are selected in this way they may not fit when the emergency arises.

But against all these difficulties the outstanding fact is that in disputes which do not involve simply questions of right and that cannot be determined according to judicial standards, there is no better plan than to give time for inquiry, to provide means for deliberation and suggestions, to afford a chance for popular passion to subside, to open a way for compromises without humiliating surrenders. If there is a clash of interests, it is idle to expect solutions without the endeavor to harmonize interests, or at least to find the sacrifices that are least objectionable. The very fact that the question is political may give a wide range for solutions which strictly legal determinations cannot have. Above all, the object is to focus attention upon the possibility of peaceful adjustments. Peoples and their governments must pause before they fly in the face of the informed opinion of the world. In an acute crisis each party to the dispute is intent on two things,—first, to avoid national humiliation and, secondly, to justify its conduct. The processes of peace require the exposure of fictitious excuses and of unreasonable demands, while pointing a way out which can be accepted without shame.

Whatever the difficulties of conciliation, the scheme proposed at Locarno is probably the best that could be devised to make war difficult. The great advance lies in making the way of the aggressor hard. But assuming, as it is hoped, that the Locarno treaties will go into effect, they will fail of their purpose if the disposition which led to their negotiation does not persist. And the best assurance of this persistence is not in the probability that the ambitions of men and nations will cease, or that the capacity for passionate feeling will diminish, or that psuedo-patriots will not seek to capitalize national fears and prejudices, but that there will remain a preponderant conviction of the futility of war,—an abiding consciousness that unjustified resort to force and disregard of available methods to obtain peaceful solutions will draw upon the offending government the denunciation of mankind.

Locarno leaves many serious problems unsettled,—the ever present problems of the Balkans and of Russia, the exigencies of the Near East and the Far East. But these problems will never be settled if the great Powers cannot deal successfully with those of Western Europe. If they are successful with these, they may have the coherence, the reasonableness, the vision, to bring about the adjustment of others. The peace of Locarno is not completed, but it is the essential beginning and points the way.

During the past year, the event in this country of outstanding international significance is the decision of the Senate to give its assent to the

adherence of the United States, upon stated conditions, to the Protocol establishing the Permanent Court of International Justice. When this recommendation was made to the Senate, it was thought that the controversy over the Treaty of Versailles had not obscured our historic policy with respect to the setting up of a permanent international court. We had had an abiding interest in international arbitration. In 1890, Congress had asked the President to negotiate with other governments to provide for arbitral determination of any differences or disputes which could not be adjusted by diplomatic agency. Our delegates at the First Hague Conference had a plan for a permanent court, and when the Second Hague Conference failed to set up the permanent court we had desired, President Roosevelt said:

> Substantial progress was also made toward the creation of a permanent judicial tribunal for the determination of international causes. There was very full discussion of the proposal for such a court and a general agreement was finally reached in favor of its creation. The Conference recommended to the signatory Powers the adoption of a draft upon which it agreed for the organization of the court, leaving to be determined only the method by which the judges should be selected. This remaining unsettled question is plainly one which time and good temper will solve.

President Harding, who as a member of the Senate had been through the controversy over the Treaty of Versailles, said in making the recommendation for our adherence to the Protocol of the court:

> It is not a new problem in international relationship; it is wholly a question of accepting an established institution of high character, and making effective all the fine things which have been said by us in favor of such an agency of advanced civilization.

That a large number of our citizens should have failed to approve this proposal must be deemed to be due in part to a lack of understanding of the function of an international court. It is not fully appreciated that resort to the court is optional; that we are not bound unless we do resort to it; that if we have controversies we cannot decide them for ourselves, and if they cannot be adjusted by diplomacy they are the subject of arbitration when they belong to the class which would ever be referred to a court. It does not seem to be understood that if we have an arbitration, the decision will depend upon the views of the umpire or third arbitrator, and that if we cannot agree upon the selection of the umpire or a third arbitrator the only way is to have him selected by some third Power or chosen by lot. Many do not realize that a permanent court of international justice, with learned judges of approved character and independence, set apart to give their lives to judicial service, will afford a far more satisfactory recourse for us than the ordinary arbitral method. It is not realized that the establishment of a permanent court is in our own interest.

But the fear has been widespread that in some way, by adhering to the

Protocol of the court, we should become identified with the League of Nations, and this fear was fostered by the rejoicing on the part of the friends of the League and the assertion that the recommendation of the President was the first step. The fact remains that the court was set up under a separate agreement and that our adherence will not give us a single right or impose upon us a single duty under the Covenant of the League.

The most serious objection was that the court is not a true judicial institution, but is an agency of the League,—a mistaken view as the statute establishing the court safeguards its independence and its judicial functions. What seems to have been lost sight of by many is that, however opposed to joining the League we may be, the nations who are members of the League are still nations with whom we must in any event collaborate if we are to have a permanent international court. We cannot set up such a tribunal without them; there is no hope of setting up another one. It should be apparent that we must either abandon our historic policy and forego the advantages of a permanent court of international justice or support and assist in safeguarding the one which has been established. If we are in favor of such an international judicial institution, our weighty influence should be exerted to maintain it.

Some seem to think that we have no interest in such a court if it is disposing of the disputes of others. Our domestic experience should teach us differently. The most peaceably disposed citizen who never gets into court has the liveliest interest in the maintenance of judicial administration to settle the controversies of his contentious neighbors and thus aid in keeping the peace.

After a long debate the question has been settled for us. The conditions and reservations attached to our adherence have been laid down by the treaty-making power in accordance with our constitutional method, and so far as we are concerned these conditions and reservations are final. No one has any authority to modify them or to explain them away. They speak for themselves. In providing that we shall not assume obligations under the Covenant; that we are to have the right to participate in the election of judges; that we are to bear a share of the expense; that we may withdraw our adherence at any time and that the statute establishing the court shall not be amended without our consent; we are making conditions to which it would seem no just exception could be taken.

Whatever may be thought of the necessity for the reservation as to advisory opinions, which in any event could not be binding upon us unless we invited them, it cannot be doubted that acquiescence in this condition will buttress the court in the proper exercise of its judicial functions. The giving of advisory opinions is a convenient practice. It has been safeguarded by appropriate rules adopted by the court itself. These rules provide that advisory opinions shall be given after deliberation by the full court. The opinions of dissenting judges may, at their request, be attached. Notice of

a request for an advisory opinion is to be given to the members of the court, to the members of the League, and to the states mentioned in the Annex to the Covenant, the United States being one of the latter. The advisory opinion is to be published.

In the Eastern Carelia case, the Court refused to give an advisory opinion when it appeared that, under the form of such an opinion, it would really decide or express its views upon the merits of a dispute, the parties to which, one not being a member of the League, had not agreed to submit it to the Court. The Court said: "Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a court of justice cannot, even in cases of advisory opinions, depart from the established rules guiding their activity as a Court." Judge Moore, the eminent American jurist who is one of the judges of the Permanent Court, has told us that

> both the conclusion arrived at and the reasoning by which it was reached refute the forecasts and should dispel the apprehensions of those who have reiterated that the Court would, as the creation or creature of the League, enforce the League's organic law, the Covenant, above all other law, without regard to the rights under international law of nations not members of the League. The Court has in fact done just the contrary.

The Court is a new institution. Its success is of vital importance to the cause of peace. That success will depend upon the confidence its work inspires. That confidence will be measured by the strictness with which the Court adheres to the judicial function and is deemed to be free from all political entanglements. We have American precedents of long standing in several States for the giving of advisory opinions. But the prestige and commanding influence of the Supreme Court of the United States is largely due to the confinement of the exercise of its great authority to the decision of actual controversies. The reservation of the Senate as to advisory opinions is a precaution; whether necessary or not, it asks for an assurance which is in aid of the Court's appropriate jurisdiction and the giving of which will help rather than diminish its just influence as a supreme judicial tribunal.

The further provision that our recourse to the Court should be by treaties merely relates to our own procedure in submitting controversies, the submission of which is optional. It emphasizes the traditional attitude of the Senate as shown by our existing treaties of arbitration which require the assent of the Senate before a submission to arbitration is effective.

The significant thing is that the United States has reaffirmed its historic policy and has offered upon conditions considered to be appropriate its support of the Permanent Court of International Justice. We trust that this offer will be welcomed by the other Powers and be accepted.

Meanwhile, the Court has been functioning and the effort is being made to supply it with a more authoritative and enlarged body of law through the

process of codification. The Court is not at liberty to decide *ex aequo et bono* unless the parties to a cause so agree. It is to render its decisions according to law. The inadequacy of the law is a matter of grave concern, and there is need not simply for judicial action but for appropriate legislative activity on the part of the civilized governments whose consent makes the law. As we extend the law we enlarge the opportunity of the Court to serve.

Following the example set by the Pan American Union, the codification of international law has been taken up by the League of Nations. A large committee of jurists was assigned to the task of selecting the subjects deemed to be most appropriate for the consideration of conference, and subcommittees are at work upon various topics. The matter is thus taken out of the generalities of those who have talked rather freely of making international law, as though it were like passing a bill in a single legislature, and we are now at grips with realities. It will be a slow undertaking, but the important thing is that it has been begun in a systematic way. A large force of expert road-builders are engaged in trying to clear and make serviceable the highways of international justice.

The year has witnessed renewed efforts to bring about a limitation of armament. Competitive armament is the outward sign of an inward distrust and will go on until confidence replaces fear and suspicion. It is said that there must be first a mental and moral disarmament, by which is meant that nations must feel secure and cease to think of war. If the Locarno treaties should fail, there would be no prospect for disarmament. If they become effective, the way is open, but it is one of the greatest difficulty in finding satisfactory standards of military strength and practicable measures of limitation. It would not be profitable to discuss these obstacles. I may, however, be permitted to say that whatever may be the difficulties in finding formulas for the limitation of land armaments, it ought to be possible to follow up the work of the Washington Conference and to provide satisfactory limitations of auxiliary naval craft. For this purpose it is not necessary to find formulas for all states having ships. Here again the effort to be comprehensive may stand in the way of practical undertakings. There are only five Powers with navies of considerable size. These Powers are at peace and contemplate no acts of aggression. Naval strength is relative and its standards may readily be defined. Competition while restricted as to the great and expensive battleships should not be permitted to go on with respect to the smaller craft. It is an economic and preventable waste which the states concerned cannot afford. It is hoped that at least this open path to further limitation of naval armament, which involves no sacrifice of security but gives relief to burdened peoples, will be pursued, and that we may next year record further progress in testing the sincere desire for peace by the voluntary restriction of the unnecessary multiplication of the instrumentalities of war.

Whatever may be before us, the prospect is better than it was a year ago.

We seem to be emerging from a lawless period, from conditions of extreme discouragement, and despite the temporary set-back the opportunity is so plain that it is difficult to believe that advantage will not be taken of it. Peace is a state of mind. If the state of mind exists, it will find expression in agreements and institutions, in the willingness to assume obligations of mutual self-restraint. To lose the momentum that has been gained would be an incalculable disaster.

The PRESIDENT. Mr. Clement L. Bouvé, member of the Bar of the District of Columbia, will now present an address on "The Confiscation of Alien Property." I have pleasure in presenting Mr. Bouvé.

THE CONFISCATION OF ALIEN PROPERTY

BY CLEMENT L. BOUVÉ

Of the Bar of the District of Columbia

The subject of the confiscation of alien property is a broad one, radiating important and extensive ramifications; so broad, that an attempt to discuss it thoroughly from even one of its many aspects through the medium of the present address is obviously out of the question. With the mention of the right to confiscate alien property the mind naturally adverts to those conditions which, above all others, stimulate the tendency toward the exercise of the power, and under which, consequently, questions concerning the right to exercise it most frequently arise. I refer to a state of war, the rules for the conduct of which constitute so important a branch of the law of nations—itself, perforce, a part of the legal system of every civilized state. I shall, therefore, address my remarks in the main to the question to what extent, at this day and time, this branch of our law recognizes the right of a belligerent state to confiscate the property, located within its borders, of nationals of a country with which it is at war.

Constant adherence to a given course of action in international intercourse by a single state will ultimately result in the establishment of a principle or rule of conduct on the part of a nation which advocates or practises such course of action. Adherence to the principle will in the end establish a custom to which the state may or may not in a given case, attribute the force of law. But though the field of operation is international intercourse, the custom is not one of international intercourse until it is adopted by the civilized nations of the world. Until thus adopted, it is not binding on other nations, or, from the standpoint of international obligation, upon the state which advocates or practises it. Until the principle receives the consent of nations as a family, its advocacy or practice on the part of a single state cannot, therefore, be pointed to as an adherence to or acceptance of an international custom. It remains but the custom of a single state. But once the custom has been accepted by other states to an extent which can fairly raise

the question as to whether it has become a rule of international law, the rule of conduct observed by the state which originally advocated it constitutes an element to be weighed in reaching the conclusion as to whether a uniform international usage has in fact come into existence. Let us consider the attitude and policy of the United States toward and with respect to the question of the confiscation of alien property within its borders in time of war, as well as the custom of nations in regard to the matter.

On May 7, 1784, Congress passed a resolution that, whereas on the 29th of October, 1783, instructions had been sent to the ministers of the United States at Versailles empowered to negotiate a peace, for concerting drafts or propositions of amity and commerce with the commercial Powers of Europe, it would be advantageous "to conclude such treaties with Russia, the Court of Vienna, Prussia, Denmark, Saxony, Hamburg, Great Britain, Spain, Portugal, Genoa, Tuscany, Rome, Naples, Venice, Sardinia and the Ottoman Porte," and that in the formation of these treaties certain points be "carefully stipulated," among which were "that it be proposed, though not indispensably required, that if war should hereafter arise between the two contracting parties, the merchants of either country, then residing in the other, shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance;" and that other classes of persons engaged in useful and peaceful pursuits should be allowed to continue the same unmolested by the armed forces of the enemy; "but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price."[1]

This instruction is of peculiar interest when read in connection with the treaties with Prussia (Articles XXIII of the treaties of 1785 and 1799, and Article XII of that of 1828) which in many respects are identical with paragraph 4 of the above instruction. Thus at the outset of the existence of the nation the United States adopted, announced, and in every way attempted to foster and develop a principle—the immunity from confiscation of enemy private property on land—which, even at that early date had already crystallized into a practice mitigative of the strict and rigid rule which declared it to be the right of the sovereign to confiscate the property of an enemy wherever found.

The ineffectiveness of the treaty provision of 1783 with Great Britain restoring British creditors their legal rights; the remedy applied under the treaty of January 8, 1802, in the form of cash compensation for confiscations carried out by several of the States; the provisions of Article X of the Jay Treaty of 1794 against the sequestration or confiscation, in the event of war, of debts due from individuals of the one nation to individuals of the other; and the views of Hamilton against "the confiscation of a property

[1] Secret Journals of the Acts and Proceedings of Congress, Vol. 3, p. 484.

upon the breaking out of war, which, during peace served to augment the resources and nourish the prosperity of a state," have been made the subject of detailed comment in an article recently published in the *Journal* of this Society.[2]

The Supreme Court decisions of that period sustain the right of the sovereign to confiscate, but recognize the existence of a usage modifying the exercise of the power. In Ware *v.* Hylton,[3] the court characterized the confiscation of private debts as disreputable, unjust, unpolitic, destructive of confidence, violative of good faith, injurious to the interests of commerce, and in most cases impracticable; held that the rule giving the right to confiscate "is certainly a hard one, and cannot continue long among commercial nations"; and further characterized it as one which "ought not to have existed among any nations, and perhaps is generally exploded at the present day in Europe."

In Brown *v.* United States [4] Chief Justice Marshall declared that war gives to the sovereign full right to confiscate the property of the enemy wherever found; but asserted that this "rigid rule" is mitigated by the rule "received throughout the civilized world" that "tangible property belonging to an enemy and found in the country at the commencement of war ought not to be immediately confiscated;" and declared that while the rule "will more or less affect the exercise of the right to confiscate," it "cannot impair the right itself." He denies that "modern usage" constitutes a rule which acts directly upon the thing itself by its own force, and states that "when war breaks out the question of what shall be done with enemy property in our country is a question of policy rather than of law." The actual decision reached was that private enemy property found within the United States in time of war was not confiscated by the mere fact of war, and could not be confiscated except by an act of Congress authorizing such confiscation; and this decision was based on what the great Chief Justice found to be the "modern" international rule governing the subject matter: that tangible property of an enemy alien thus situated "ought not to be immediately confiscated."

Wharton,[5] quoting Wheaton, Kent, Halleck and Woolsey, states that the court in the Brown case was unanimous in deciding "primarily and unequivocally that the right exists to confiscate enemy property found in the country on the advent of war." With this statement Professor Moore takes strong issue, as not being justified by the facts, alleging that a *dictum* merely was uttered to this effect. And he adds: "The supposition that usage may render unlawful the exercise of a right, but cannot impair the right itself, is at variance with sound theory. Between the effect of usage on rights and on the exercise of rights, the law draws no concise distinction."[6] Marshall

[2] Borchard, "Enemy private property," A. J. I. L., No. 3, July, 1924.
[3] (1796), 3 Dallas, 199.
[4] (1814), 8 Cranch, 110.
[5] Int. Law Dig., Vol. III, p. 250.
[6] Int. Law Dig., Vol. VII, p. 313.

accepts the "modern" rule (of 1814) that the property described "ought not to be immediately confiscated" as satisfactory evidence only of the fact that a declaration of war, while it gives the right to confiscate, does not, *per se*, effect confiscation. He did not, and from his own interpretation of the "modern usage," could not accept it as a rule of right acting on the thing itself and binding upon nations. Judge Moore states that we may "turn for the true theory of the law to an opinion of the same great judge delivered twenty years later, in which he denied the right of the conqueror to confiscate private property, on the ground that it would violate *the modern usage of nations which has become law* (United States *v.* Percheman, 7 Peters, 51)." [7] This would necessarily seem to imply that at the end of the twenty years intervening between the Brown and Percheman decisions Marshall had come to recognize the fact that the "modern usage" that property so situated "ought not to be immediately confiscated" had been displaced by a generally accepted principle that it *could* not be lawfully confiscated. The right to confiscate, of which, in 1814, Marshall had entertained no doubt, had been impaired by the crystallization of the rule of mitigation into a rule of law.

A similar instance is afforded by the decision of the Supreme Court in the case of the *Paquete Habana* [8] where the property involved was not enemy property on land. It was there contended that international law recognized no exemption from capture of enemy fishing boats; and Lord Stowell's judgment in the case of the *Young Jacob and Johanna* (1798), in which he declared the exemption to be based on "a rule of comity only and not of legal decision," was principally relied upon to support this view. On this point Justice Gray, speaking for the majority of the court, declared:

> But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow by the general assent of civilized nations, into a settled rule of international law. As well said by Sir James Mackintosh: "In the present century a slow and silent, but very substantial mitigation has taken place in the practice of war; and in proportion as that mitigated practice has received the sanction of time it is raised from the rank of mere usage, and becomes part of the law of nations." Discourse on the Law of Nations; 1 Misc. Works, 360.

The court referred to the case of Brown *v.* United States, saying:

> There are expressions of Chief Justice Marshall which, taken by themselves, might seem inconsistent with the position above maintained, of the duty of a prize court to take judicial notice of a rule of international law, established by the general usage of civilized nations as to the kind of property subject to capture. But the *actual decision in the case*, and the leading reasons on which it was based appear to us rather to confirm our position. (*Italics volunteered.*)

Thus, under the Percheman decision, rendered in 1834, Marshall had declared it to be the law of nations that private property on land was exempt

[7] Moore, Int. Law Dig., Vol. VII, p. 313. [8] (1899), 175 U. S. 677.

from confiscation as enemy property; and in 1899, and upon the same authority, the Supreme Court in the case of the *Paquete Habana* had so declared with respect to property of a certain type upon the sea.

During the Civil War, Congress passed the Confiscation Acts of 1861 and 1862. The first "was aimed exclusively at the seizure and capture of property used in aid of the insurrection. The Act of July 17, 1862, proceeded upon the entirely different principle of confiscating property without regard to its use, by way of punishing the owner for being engaged in rebellion, and not returning to his allegiance."[9] The Abandoned and Captured Property Act of 1863 was an exercise by the government of its rights as a belligerent, but at the same time it "recognized to the fullest extent its duties under the enlightened rules of modern warfare. . . ."[10] A reference to these acts is of interest here only as they indicate the views of this government concerning its right to deal in time of war with private property belonging to persons affiliated with a community to which, although steadfastly refusing to recognize it as alien, the government was bound to concede the character of enemy.

There seems, to my mind, to exist every reasonable ground for the conclusion that long before 1899, the date of the First Hague Conference, the rule had been universally accepted among civilized nations that private property is exempt from confiscation in time of war. In 1856, Lord Palmerston had expressed the hope that "in the course of time those principles of law which are applied to hostilities by land, may be extended without exception to hostilities by sea, so that private property shall no longer be the object of aggression on either side."[11] Article 38 of the Brussels Convention of 1874 contained the provision that "private property cannot be confiscated,"[12] and was adopted at the Hague Conference of 1899 as in the Brussels draft.[12]

John Hay closed his instructions to the American delegation to the First Hague Conference with the following admonition:

> As the United States has for many years advocated the exemption of all private property not contraband of war from hostile treatment, you are authorized to propose to the conference the principle of extending to strictly private property at sea the immunity from destruction or capture by belligerent powers *which such property already enjoys on land*, as worthy of being incorporated into the permanent law of civilized nations.[13]

In a report presented at that conference by Mr. Rolin it is stated:

> The four Articles 44–47 are the Brussels Articles 36 to 39, inclusive, with some very slight changes. They set forth the *recognized essential*

[9] Moore, Int. Law Dig., Vol. VII, p. 291, citing Oakes *v.* United States, 174 U. S. 788.
[10] Young *v.* United States, 97 Wall. 39, 60.
[11] Scott, Hague Conferences, Vol. II, of 1907, p. 757.
[12] Scott, *op. cit.*, 1899 Conf., p. 488.
[13] Scott, Hague Peace Conferences, American Instructions and Reports, p. 9.

> *principles* which must serve the invader and the occupant as a general rule of conduct in his relations with the population. These principles safeguard the honor and lives of individuals *and their private property*. . . .[14]

The 1899 Hague Conference did not adopt the American proposal as to the exemption from confiscation of private property at sea; but in Article 46 of the annex to the Convention with Respect to the Laws and Customs of War on Land, provided that "family honors and rights, individual lives and private property, as well as religious convictions and liberty, must be respected. Private property cannot be confiscated;" thereby stating the rule exempting private property from confiscation in practically the same terms as those in which the Brussels draft had proclaimed it a quarter of a century before.

At the Hague Conference of 1907, Article 46 was included in the corresponding annex to the same Convention, the word "liberty," used in 1899, being substituted by that of "practice." The broad principle of the exemption of private property at sea was again proposed by the American delegates and again rejected; but an examination of the discussions and proceedings show that when Mr. Choate, as first American delegate, arguing in support of the principle, pointed by way of analogy to the exemption from confiscation of private property on land as a principle "which is now established for centuries by the usages of nations," his statement was often corroborated and not gainsaid even by his opponents on the floor.

The immunity from confiscation of alien property on land in time of war stands in the records of these great international compacts, not as the announcement of a new principle obtaining its original force by convention, but as a solemn affirmation of an existing doctrine already incorporated into the practice and law of nations.

Says Oppenheim, writing in 1911:

> Although several writers maintain that according to strict law, the old rule, in contradistinction to the usage which they do not deny, is still valid, it may safely be maintained that it is obsolete, and that there is now a customary rule of international law in existence prohibiting the confiscation of private property, and the annulment of enemy debts on the territory of a belligerent.[15]

When the United States entered the World War, Great Britain, France, and Germany had already put into effect their policies of conservation, sequestration and liquidation of enemy property situated within their borders. The measures taken by these Powers are carefully analyzed by Professor Garner in his admirable work, *International Law and the World War*.[16] In certain instances, he says, these measures deteriorated into what was in

[14] Annex to minutes of meeting of July 5, Scott, Hague Conferences, Conference of 1899, pp. 414, 428.

[15] International Law, 1912 ed., Vol. II, p. 139.

[16] Vol. I, pp. 86–101.

effect "a policy of spoliation and confiscation." What is worthy of comment here is that all three nations were loud in their assertion of the principle of the immunity of private property from confiscation, and mutually denounced what they declared to be confiscation effected under another name as violative of the law of nations.

With the entrance of the United States into the war, millions of aliens, the subjects of the Powers with whom the United States had come into conflict, were residing in its territory; and hundreds of millions of dollars' worth of alien (enemy) owned property was located within its jurisdiction. As stated by the House Committee on Interstate and Foreign Commerce, in recommending the passage of the original Trading With the Enemy Act,[17] "never were the industrial, commercial and financial resources of belligerent nations so vital to the success of war as now."

Speaking of the enforcement of the act, Professor Garner says:

> Seizures and sales were in the main limited to property owned, not by enemy aliens residing in the United States, but by enemy subjects residing or domiciled in the enemy country and embracing persons actually engaged in making war against the Government and people of the United States. . . .
>
> If it was intended that the proceeds should be held in trust for the benefit of the owners, with whom an accounting should be made at the close of the war, the act may be justified, although it is difficult to see what military purpose was subserved by it. If, on the contrary, no such restitution was contemplated or intended, the measure was one of plain confiscation and it is hard to see how it can be reconciled with the established rule of international law in respect to the immunity of private property in land warfare.

It is worthy of particular notice that the Trading With the Enemy Act, in defining the word "enemy" in connection with enemy property, did not describe as coming within that classification the citizens or subjects of the nations with which the United States was at war and who were residing within the United States, merely because they were such citizens or subjects. "It does not appear," says Professor Garner, "that the property of any German subject residing in the United States, or not actually engaged in making war against the United States, or not interned, was seized or sold."

Honorable Charles Warren, largely the draftsman of the original act, on the occasion of the hearing before the subcommittee of the Committee on Commerce of the United States Senate[18] stated:

> The theory of the bill is that enemy property . . . if the President so directs, shall be temporarily conscripted by the Government . . . to be paid back to the enemy or otherwise disposed of at the end of the war, as Congress shall direct. In other words, we fight the enemy with his own property during the war; but we do not permanently confiscate it.

[17] H. Rep. 85, 65th Cong. 1st Session.

[18] 65th Cong. 1st Session, H. R. 4960, 131–132.

Extracts from an official statement approved by the President, made by the Alien Property Custodian on November 14, 1917, read as follows:

> The broad purpose of Congress as expressed in the Trading With the Enemy Act is, first, to preserve enemy-owned property situated in the United States from loss, and secondly, to prevent every use of it which may be hostile or detrimental to the United States. . . . There is of course no thought of the confiscation or dissipation of the property thus held in trust.

In a report of June 21, 1917,[19] the House Committee on Interstate and Foreign Commerce asserted that "the purpose of the bill is not to create new international rules or practices, but to define or mitigate them."

In a favorable report on this measure, submitted August 31, 1917,[20] Senator Ransdell said:

> The purpose of this bill is to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations. . . . It also provides for the care and administration of the property and property rights of enemies and their allies in this country pending the war. . . . Under the old rule, warring nations did not respect the property rights of their enemies, but a more enlightened opinion prevails at the present time, and it is now thought to be entirely proper to use the property of aliens without confiscating it.

In discussing the amendment of March 28, 1918, whereby the Custodian remained vested with all the powers of a common-law trustee and was given in broad terms the right to dispose of the property seized by him as if he were the actual owner, Senator Martin said: "The amendment simply provides that this property shall be put fairly on the market;" and with respect to this point the Attorney General has expressed himself as follows:

> I am of opinion that it was the intention of Congress that any disposition by sale of the property which comes into the possession of the Alien Property Custodian should be only at a substantial and fair consideration, the proceeds, of course, under other provisions of the Act, being paid into the Treasury of the United States, there to await the further action of Congress.[21]

In a favorable report made upon proposed legislation for the relief of certain classes of aliens whose property had been seized under the Act[22] it was stated:

> The United States, while holding approximately $556,000,000 worth of private property which it found in this country, belonging to individual citizens of enemy countries residing in their country at the outbreak of the war, and still residing there, does not intend to confiscate this property. It was the intention of Congress when the property was

[19] H. Rep. 85, 65th Cong. 1st Session.
[20] S. Rep. Nos. 111 and 113, 65th Cong. 1st Session.
[21] 31 Op. Atty. Gen. 463.
[22] See H. Rep. 1089, June 2, 1920, 66th Cong. 2nd Session.

taken that it should merely be held in custody during the war, and that, after the war, the property or its proceeds should be returned to the owners. It has never been the purpose or practice of the United States to seize the private property of a belligerent to pay our government's claims against such belligerent. Such practice is contrary to the spirit of international law throughout the world.

The bill was passed by both House and Senate shortly after the rendering of the report.[23]

In a separate opinion in the case of the Swiss National Insurance Co. *v.* Miller,[24] Mr. Justice McReynolds, after reviewing at length the original Trading With the Enemy Act and subsequent legislation, states that "confiscation is everywhere disavowed;" and that the intent to conserve and utilize enemy property upon a basis of practical justice, and to prevent the owners from receiving benefits therefrom until after the war, but without ultimate confiscation, is clear.

The expressions of some of the lower Federal courts with respect to confiscation are of interest. It has been stated that "it is presumed that the United States will not confiscate property in the hands of the Alien Property Custodian." [25]

"I take it," says Judge Learned Hand, "that the United States was not looking for plunder, but to prevent enemies from owning property within its borders. . . . Congress has not yet committed itself to confiscation of enemy property, and the rules of international law have been against it for two centuries;" [26] and in the case of Stoehr *v.* Wallace,[27] he says that the plaintiff "has some expectation that Congress may not apply its power under section 12 to the stern extremity of confiscation when peace finally comes." "Up to the present time in any case," says the same judge,[28] "it (the national power) has not been exercised to the full extent of confiscation, as might have been done." Says another court: "The Trading With the Enemy Act is not for the confiscation of property. It is rather for its conservation." [29] And another: "Congress might have provided for the confiscation of enemy property, but it did not do so. The Act on its face is plainly not confiscatory." [30] And still another refers to results which would follow in a given case, "in default of the later exercise by Congress of the power of confiscation now seldom brought into play in the practice of enlightened nations." [31]

A very recent decision of the Supreme Court [32] sustained the right of the

[23] Congressional Record, Vol. 59, part 8, pp. 8429–8475.
[24] 267 U. S. 42.
[25] Banco Mexicano, etc. *v.* Miller, *et al*, Court of Appeals, D. C., 1922, 289 Fed. 924.
[26] Stoehr *v.* Miller, U. S. D. C., S. D. N. Y., 1923.
[27] 269 Fed. 827.
[28] In Kahn *v.* Garvin, 263 Fed. 909, 916, 1920.
[29] *In re* Gregg's Estate, Penna. Sup. Ct. 1920, 266 Pa. 189.
[30] Sup. Ct. King's County, N. Y., 106 N. Y. Misc. 545.
[31] Techt *v.* Hughes, N. Y. Ct. App. 1920, 229 N. Y. 222.
[32] Littlejohn & Co. *v.* U. S., Adv. Opinions Sup. Ct., Mar. 15, 1926, p. 207.

President to take possession of and title to an enemy-owned merchant vessel in an American port at the outbreak of war, by authority of joint resolution of May 12, 1917. In its decision, the court said:

> We do not doubt the right of any independent nation so to do without violating any uniform or commonly accepted rule of international law. . . . Certainly, all courts within the United States must recognize the legality of the seizure; the duly expressed will of Congress when proceeding within its powers is the supreme law of the land.

The court's attention was called to Articles 1 and 2 of Convention VI of the Hague Peace Conference of 1907, the first of which provides that "it is desirable" that merchant ships in the ports of a belligerent Power at the outbreak of war should be allowed to depart freely; and the second that a merchant ship unable to leave or not allowed to leave, should not be confiscated. And its attention was further called to the practices of the British prize courts with respect to the matter. The court pointed out that "the United States did not approve that convention;" concluded that the rule of international law was that states, unless limited by convention, are free to confiscate enemy ships in their harbors when war occurs; and that this rule was recognized by the Hague Conference, which sought by agreement to modify it.

The reason why the United States did not approve the convention was, not because it felt that the provision went too far in protecting such property, but because it did not go far enough. Mr. Choate states in his report that it was the view of the American delegation "that the privilege [of free departure] had acquired such international force as to place it in the category of obligations," and it opposed the articles of the convention which "regard it as a delay by way of favor, and refer to the practice as desirable." It refused to agree to Article 2, feeling that in practice "it would approach confiscation." [33] The opinion should not be taken as holding that the vessel in question was, under that joint resolution, subject to confiscation; but as deciding that, by the seizure, a valid title and possession passed to the United States. That confiscation was not contemplated, would seem to be clear, for it is to be noted that Section 2 of the joint resolution in question authorizes the appointment of a Board of Survey to which was assigned the duty of ascertaining the actual value of any vessel that might be thus taken, its equipment and all the property contained thereon, and of making a written report of its findings to the Secretary of the Navy; such findings to be "considered as competent evidence in any proceedings on any claim for compensation."

Section 5 of the Treaty of Peace with Germany provides that the property of German subjects seized under the Trading With the Enemy Act shall be held to await the disposition of Congress. So does the Trading With the

[33] Scott, Hague Peace Conferences, American Instructions and Reports, pp. 107–109.

Enemy Act, the terms of which have so many times been found by the courts to constitute a disavowal of any intent to confiscate enemy property.

It is not perceived that the United States, either by the Treaty of Berlin or by the seizure of enemy property in this country under the Trading With the Enemy Act, has repudiated its traditional policy and practice of regarding such property as exempt from confiscation in time of war. If the above view is correct, there has been no disregard by the United States of that principle of the law of nations that private property on land is not lawfully subject to confiscation.

Article 297 of the Treaty of Versailles provides that:

> Subject to any stipulations which may be provided for in the present treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging . . . to German nationals, or companies controlled by them within their territories, colonies, possessions and protectorates, including territories ceded to them by the present treaty.

Under this treaty, the enemy country is to compensate its expropriated nationals. It is difficult to see how provisions which contemplate compensation for property seized, announce a policy of confiscation. Conceding for the sake of argument only that the terms of a single treaty of peace, irrespective of the importance or numbers of the parties signatory thereto, could destroy a principle of international law founded upon a usage maintained by those parties for several generations, the intent to repudiate must, it is thought, be expressed in unmistakable terms. But as no single nation, or separate group of nations, can make international law, neither can they unmake it; for to unmake it means the substitution of a new rule for the old. "A right," says Marshall in the case of *The Antelope*, "which is vested in all by the consent of all, can be divested only by consent."[34]

The extent to which a state will exert the national power in war time is always a matter of conjecture. The extent to which the power may be "lawfully" exercised is necessarily bounded by the inhibitions and restrictions imposed by the law of nations, and (where they exist) by limitations imposed by the municipal law. This principle, in its application to the United States, has been announced on various occasions.

In expounding the Constitution, which contains no express limitations on the war powers of the government, "a construction," says Marshall in the Brown case,[35] "ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere;" and Story, in the dissenting opinion in that case, states that the executive, in exercising the war powers with which he is vested, "cannot lawfully transcend the rules of warfare established among civilized nations. He cannot

[34] See Miller *v.* Ship *Resolution*, 2 Dallas 1, 4 (1781); The *Scotia*, 14 Wall. U. S. 170, 187, (1871); The *Paquete Habana*, 175 U. S. 677, 711 (1900); The *Antelope*, 10 Wheat. U. S. (1825), 66, 122.

[35] 8 Cranch, 125.

lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims." "The power to prosecute war granted by the Constitution," says Justice Field[36] ". . . is a power to prosecute war according to the law of nations, and not in violation of that law. The power to make rules concerning captures on land and water is a power to make such rules as Congress may prescribe, subject to the condition that they are within the law of nations." And the learned justice quotes Kent, that as an independent nation the United States became "subject to that system of rules which reason, morality and custom had established among the civilized nations of Europe as their public law;" and Halleck, that the United States is not freed from the prohibitions of the law of nations regarding the conduct of war merely because they are not inserted in the Constitution.

In the case of the *Paquete Habana*, so often referred to, Justice Gray declared the position of the majority of the court to be that it was "the duty of a prize court to take judicial notice of a rule of international law established by the general usage of civilized nations as to the kind of property subject to capture."

In several of the decisions, already quoted, which applied the law of the Trading With the Enemy Act, the courts, directly or indirectly, assert the existence of a power in Congress to confiscate the property in question. This should not, it is thought, be taken to mean that, once the question of a right claimed in connection with such an act of confiscation has been properly presented for determination, the point of whether the exercise of the power constituted a violation of the law of nations could not receive judicial cognizance.[37] For, to adopt the language of the Supreme Court in the case of the *Paquete Habana*, *supra*, "international law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

It has been judicially recognized that "neither the law of nations nor the faith of the United States would justify the legislature in authorizing the annulment of rights or titles secured by treaties consistent with the general law of nations or modern usages thereof;"[38] and the doctrine is well established that statutes should always be construed in the light of the purpose of the government to act within the principles of international law.[39]

The PRESIDENT. Discussion is now in order. The presiding officer is always required at these meetings to call attention to the rule limiting each

[36] Dissenting opinion in Miller *v.* United States, 11 Wall. 268, 315, 316.

[37] See J. Whitla Stinson, "Title to German Ships Seized by the United States during the World War," *Univ. of Penna. Law Review*, November, 1923; and "International Sanctions and American Law," A. J. I. L., Vol. XIX, No. 3, July 1925.

[38] Stinson, International Sanctions, etc., *supra*, citing U. S. *v.* Clarke, 8 Peters (1834), 436; see Chirac *v.* Chirac, 2 Wheat. U. S. (1817), 259, 269, 272, 277; Carneal *v.* Bank, 10 Wheat. U. S. (1825), 18.

[39] MacLeod *v.* United States, 229 U. S. 414, 434.

speaker to ten minutes and putting upon the presiding officer the duty of calling attention to the expiration of that time. (After a pause.) I suppose we have not yet gone far enough in our proceedings to feel in the mood for discussion, but judging by precedents, we will have plenty of it before we get through with our annual meeting.

ELECTION OF COMMITTEE ON NOMINATIONS

The PRESIDENT. Apparently no one desires to present matter in discussion. By an amendment to the Constitution, it is necessary at the first session of the annual meeting to select five members of the Society to act as a nominating committee to nominate officers for election.

Professor D. EDWIN DICKINSON. Mr. President, I should like to place in nomination for membership on the Committee on Nominations, Professor Jesse S. Reeves, Mr. Fred K. Nielsen, Mr. Miles M. Shand, Professor Charles E. Hill, and Mr. Arthur K. Kuhn.

The PRESIDENT. Are there any other nominations for membership on the NOMINATING COMMITTEE? The Constitution provides that the NOMINATING COMMITTEE shall be selected by ballot. Do you desire to ballot, or will you allow the Secretary to cast the ballot?

Professor PHILIP M. BROWN. Mr. President, I move that the Secretary be instructed to cast the unanimous ballot of the Society for the gentlemen named.

(The motion was agreed to.)

The PRESIDENT. With his usual efficiency, Mr. Finch has already cast the ballot and the nominees are declared to have been constitutionally elected as members of the Committee on Nominations.

Before adjourning, I will call your attention to the fact that tomorrow at ten o'clock a round table conference will be held on the Function and Scope of Codification of International Law, at which Professor Reeves will preside. In the afternoon at two o'clock, a round table conference on the Codification of International Law in Respect to Nationality will be presided over by Dr. Stowell. Tomorrow evening we shall have the pleasure of listening to Dr. Bustamante and Mr. Wickersham on the subject of the progress that is being made here and there with respect to the codification of international law.

If there is no further business to come before the Society at this time, I declare the meeting adjourned until tomorrow morning at ten o'clock.

(Whereupon at 10.15 o'clock p. m., the Society adjourned until tomorrow, Friday, April 23, 1926, at 10 o'clock a. m.)

SECOND SESSION

Friday, April 23, 1926, at 10 o'clock a. m.

ROUND TABLE CONFERENCE ON THE FUNCTION AND SCOPE OF CODIFICATION IN INTERNATIONAL LAW

1. What is the function of codification in international law? Should it include legislation as well as restatement?
2. What is the most effective form of codification in international law? Treaties, uniform legislation, uniform declarations, or a code of persuasive influence?
3. What are appropriate subjects for codification in international law? Should fundamental premises or principles be included as well as substantive rules?

The conference was called to order at 10 o'clock a. m. by Professor Jesse S. Reeves, of the University of Michigan, presiding.

The CHAIRMAN. Ladies and gentlemen: You will notice by the program that the committee have arranged the program providing for two sessions having to do with the subject of the codification, the first dealing with the more general topics, and the second taking up one special topic for consideration. The plan for this morning is to have the discussion opened with two speakers, and thereafter the discussion is to be thrown open to the house. According to the program, you will see that the general topic is "The Function and the Scope of Codification in International Law," but under it are three subheads, each one of the three having two separate questions; so I think the possibilities of a comparatively wide range of discussion are rather large and I trust the audience will take advantage of that fact.

The discussion will be opened by Professor James W. Garner, Professor of Political Science in the University of Illinois.

THE FUNCTION AND SCOPE OF CODIFICATION IN INTERNATIONAL LAW

BY JAMES W. GARNER

Professor of Political Science, University of Illinois

Mr. Chairman, ladies and gentlemen: Whether, as Lord Robert Cecil asserted in the First Assembly of the League of Nations, we have not yet reached the stage where it is desirable to codify international law—a view which is held by a good many other English jurists—it is unnecessary to discuss here, even if my time permitted. It is sufficient to say that the world appears to have reached a contrary conclusion. In these circumstances, the only questions with which we are now concerned relate to the scope of the task and the methods of procedure by which it can be achieved in the most intelligent, practicable and expeditious manner.

It is quite clear that what the public demands is something more than codification in the restricted sense in which the term is commonly understood by lawyers and text-writers, that is, a mere restatement in written and orderly form of the existing well settled rules, mainly of the customary law. It was this latter sort of codification which the Brussels Conference of 1874

undertook in respect to the laws of land warfare—"to consecrate," in the language of the president of the conference, "the rules universally admitted." It was this sort of codification also which the Declaration of London represented, at least in the opinion of its authors as expressed in the preamble.

Codification in this narrow sense would be a relatively simple task, and while it would possess the advantages which flow from clearness and precision of statement in the law, jurists are not lacking who doubt whether the benefit would be worth the time and effort required to achieve it.

Whatever the facts may be as to this, the advocates of codification today are not content with a mere restatement of the existing rules. They demand, in addition, the alteration, rehabilitation and readaptation to new and changed conditions, of rules which have become inadequate, out of date, or obsolescent. More important still, they demand an extension of the empire of the law to cover a multitude of relationships which have become international in character, but which at present are regulated by the municipal law of the various states which compose the international community.

Now this clearly involves the reaching of agreement as to what the law shall be in respect to many matters concerning which there are no existing rules of international law. In short, it involves legislation, although its advocates persist in calling it codification, which it certainly is not. Nevertheless, it is not sufficient to reject it merely because it is masquerading under the cloak of an unscientific terminology. The desirability of the undertaking should be judged upon its intrinsic merits without reference to the accuracy or inaccuracy of the terms by which it is popularly described.

The demand, it is submitted, is a natural and legitimate one. As everybody knows, the progress of international law has lagged behind the development of international relations, with the result that the rôle which it has played in serving the common interests of the international community has admittedly been disappointing. What an English judge recently said in regard to the function and development of the common law may be equally said of international law. He observed that the common law "must face and deal with changing and novel circumstances. Unless it can do that, it fails in its function and declines in dignity and value. An expanding society demands an expanding common law." All will agree with our colleague, Professor Hyde, that "the welfare of international society requires a fresh enunciation, by codification or otherwise, of the principles of law that are hereafter to govern the conduct of states."

The tentative list of subjects proposed by the Committee on Progressive Codification suggests appropriate starting points, though of course it is not intended to be exhaustive. All recognize that there is an urgent need for agreement upon general rules in respect to the status of state-owned ships employed as ordinary carriers of commerce, upon international extradition, upon certain aspects of the question of the acquisition and loss of nationality, upon the international responsibility of states for injuries sustained by aliens, and upon most of the other subjects suggested by the committee. There is,

however, room for doubt as to whether the same urgency exists in regard to the need of agreement upon certain other matters which the committee has placed upon its list, such as the privileges and immunities of diplomatic representatives, measures for the suppression of piracy, and the exploitation of the products of the sea. I venture to suggest that agreement upon rules and principles relative to such matters as state succession, international servitudes, the protection of submarine cables, the interpretation of treaties, conditions upon which new states and *de facto* governments should be recognized and the status of those which are unrecognized, and, finally, perhaps suitable criteria for distinguishing between domestic and international affairs and between justiciable and non-justiciable disputes, for the purpose of arbitration, would be of more importance and is therefore more urgent.

I am informed that there has been considerable pressure from some of the members of the committee in favor of taking up the laws of war and neutrality, but it has decided, wisely in my opinion, not to occupy itself, for the present at least, with that part of international law. In my judgment, the time has arrived when statesmen and jurists should devote less of their time and energies to the formulation of rules as to how the general killing shall be carried on and the instruments which may be employed in doing it, and more to the reaching of agreements upon rules which shall govern states in their normal and peaceful relations.

Nevertheless, there are certain questions relative to the legal effects of the existence of a state of war which, it seems to me, stand on a different footing and upon which general rules are desirable. Such are the effect of war upon treaties, upon executory contracts between parties who subsequently become enemies, upon the capacity of enemy aliens to resort to the courts for the protection and enforcement of their legal rights, and upon the liability of their property to confiscation. As is well known, the status of treaties and private contracts at the close of the late war was one of great confusion and chaos; there was a wide difference of opinion as to the effect which the war had upon them, and the whole matter had to be adjusted by the treaties of peace; that is, their status was determined by the victorious belligerents under circumstances in which passions and animosities, as well as juridical principles, affected the decisions reached.

Aside from the much controverted Article 23 of the Hague Convention of 1907 relative to the conduct of war on land, which was intended by its authors to insure to enemy aliens the right of recourse to the courts for the enforcement of their contractural rights, but which has been interpreted otherwise by the British Foreign Office and the English courts, the whole matter of the rights of enemy aliens lies outside the domain of international law.

Now I come to the procedure and methods of codification. The suggestion of some jurists, among them Professor Baker of London, Dr. Hans Wehberg of Berlin, and our distinguished Chairman, Professor Reeves, that the development of international law might better be left to an international

court if there were one with appropriate jurisdiction, is not likely to find general approval, if it is meant to imply that the court should have power to make rules of law where there are none. The objection to the whole idea was well expressed by Mr. Nielsen in his argument before the Anglo-American Mixed Claims Commission in the Philippine Cable Case, and illustrations of it are often found in the special agreements by which disputes are referred to arbitration and which lay down the rules of law which the arbitrators are required to apply. For this very reason most jurists consider that the establishment of an international court has accentuated rather than diminished the necessity for codification.

It is submitted that the determination of the law in cases in which the usage of different nations is not uniform, or which, as is not infrequently the case, is directly in conflict, is a legislative rather than a judicial function, and states generally are not likely to consent to confer that power upon an international tribunal. The development of the law, therefore, must take place through other agencies and by other processes than judicial interpretation.

Without going into detail, I venture to suggest that there are three stages through which the process of all intelligent codification must go and three different sets of bodies and authorities which must participate and collaborate in the task.

The first of these, the preliminary task of assembling and organizing the materials and of drafting the *projets*, should be confided to a relatively small body, preponderantly jurists, but including experts in other fields than the law—military, naval, aëronautic, maritime—depending upon the nature of the branches of the law which it is proposed to codify. Some jurists like Mr. Root and Judge Baldwin are of the opinion that these experts should be neither government functionaries nor private persons appointed by governments as their representatives, for the reason that in such cases there is too great a likelihood that they will be diplomats or even politicians, and who in any case will regard themselves as advocates of the traditional views and practices of their own country. In all probability they would be subject to instructions and therefore not free to accept compromises and conclude agreements which varied from their instructions.

The objections appear to me to be sound and valid. Codification by an international conference representing the whole body of states, such as is now being advocated in this country, is objectionable unless it is preceded by this technical preliminary work of experts. Such a conference would necessarily be a general assembly, and therefore too large, too cumbersome, and too unwieldy to perform the difficult and necessarily slow work of codification. The experience of the two Hague Peace Conferences afforded convincing evidence of this fact. Mr. Root has remarked that the work of the first Hague Conference would have been a "complete failure" had it not been for the preliminary technical work which had been done by the Institute of International Law and which was available to the conference. Three of

the best examples of recent international codification, the Air Convention of 1919, the Statute of the Permanent Court, 1920, and the proposed Rules for the Regulation of Aërial Warfare, 1922, were all the work of relatively small bodies (committees or commissions) of experts. Their elaboration by unwieldy diplomatic conferences would have been quite impossible.

Professor P. J. Baker, of the University of London, has raised an objection to codification by what he calls "lawyers' commissions" for the reason, he says, that questions of policy are certain to arise and the solutions proposed by lawyers are not likely to commend themselves to governments whose ratifications must be obtained. It is a fair question to raise, however, whether the recommendations of a technical commission of the League, which he prefers to lawyers' commissions, would prove any more acceptable to governments. As I have indicated, any commission which is charged with the drafting of a code which embraces rules concerning military, naval, aërial, maritime and other non-legal matters, should and most likely will be composed in part of experts who are not lawyers. As to the determination by such a commission of questions of policy, it is not assumed that its rôle will include this task. That will rather devolve upon the conference to which the draft will be submitted, and which represents the second stage in the process as I conceive it. Questions of policy will there be threshed out and agreements reached.

Finally, the draft as thus agreed upon will be referred to the various governments for their acceptance, and this represents the third and final stage in the procedure. Thus in the process the jurists and other technical experts, the statesmen and diplomats in conference, and the various governments will collaborate and have a voice. This is the course, I take it, which the Council and Assembly of the League had in mind in constituting the present committee on codification. When its report is made, another commission will be appointed to prepare a draft or drafts; they will be laid before a general conference representing the whole body of states, and whatever is agreed upon will be referred to the various governments for their consideration and decision.

Professor Baker and Professor Hudson appear to prefer the method of codification which has been followed heretofore, and lately with considerable success, namely, through the agency of "law-making conferences." Now that we have the League of Nations, through whose machinery conferences can be quickly summoned and which has its various technical commissions well equipped to do the necessary preparatory work, there is no need, they argue, to have recourse to lawyers' commissions.

It may be observed, however, that the League does not possess technical commissions or other machinery for elaborating drafts of codes covering many matters of international law, some of which the committee on codification has placed upon its tentative list as being in urgent need of codification. It has no commission which is specially qualified to prepare drafts of codes dealing with extradition, nationality, prescription, jurisdiction over foreign

merchant vessels, and numerous other questions. It is not easy to see, therefore, how the services of jurists can be dispensed with.

Whatever procedure is adopted, one thing is clear: Any achievement which approximates a complete codification of international law, even if we exclude the law of war, must, if it is thoroughly done, require a long period of time. It is submitted that the task should be done by piecemeal; it must be codification by compartments, as it were. It should begin with those matters upon which agreement is most urgent and pass from these to others, somewhat as the excellent work of the Institute of International Law has proceeded. Considering the magnitude, the difficult nature of the task, and the existing constitutional arrangements which make necessary the approval of governments, it must necessarily be a slow process. *Festina lente* is the rule upon which we ought to proceed. Those who appear to think it can be done in the course of a few months would do well to remember that the most notable achievement under the name of codification since Napoleon's day—the preparation of the German Civil Code—was the work of a generation of study, discussion and of criticism. The first commission of jurists which elaborated the preliminary draft, labored for thirteen years on it. A second commission bestowed six years more of labor upon it. It was finally adopted in July, 1896, twenty-two years after the task was begun. Is it likely that the preparation of an international code, a vastly more difficult task, will require less time?

The CHAIRMAN. The discussion thus opened will be continued by Joseph W. Bingham, Professor of Law in the Stanford University Law School.

THE FUNCTION AND SCOPE OF CODIFICATION IN INTERNATIONAL LAW

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The program for this conference covers a large field, and the brevity of our debate excludes an adequate technical consideration of its important items of controversy. Therefore this introduction will attempt such a rapid survey as will suggest certain main channels in which discussion may have an efficient flow.

One's opinions on the purposes of formulating international law and on the proper content of a scheme of formulation should derive in great measure from his beliefs on the fundamental problems of the legality of force and the organization of the world for peace.

The conservatives among our technical experts, who scorn the declarations of a new order, would preserve with patching the leaky old house of their fathers in confidence that it will keep out some rain sometimes. The newly invented building materials are damned by their suspicion of dangerous

defects. They would restate the old law, resolve its uncertainties, supply formulas to cover its vacuities, and dispel doubts as to its future authority by an official fiat similar to the adoption of a municipal code by legislation. With conviction, they would emphasize the independence, equality, and exclusive jurisdiction of states and would leave their meagre duties correlated with an unfettered liberty of action. Many of them would give a large place to the law of war and industriously refurbish the threadbare rights of neutrals.

Quite different is the program of the advocate of a new order. He believes that the old law fails to respond to the needs of a peace-seeking world. Peace was not its principal end. Indeed it made no choice between peace and war. Throughout it laid its emphasis, not merely, if at all, on a just independence of states in the governance of their separate affairs, but on their liberty of action against others, which is quite a different matter. It is true that there was much assertion of international duties and of limitations on state jurisdiction, but although transient motives of commercial profit or other mutual benefits were strong enough to foster some traditional legal inhibitions here and there, international aggression was not seriously embarrassed by legal restraints. The larger interests of states were beyond the prohibitions of law, and to the extent of its actual power, a state might enforce its will in any part of the world without legal condemnation. For war and the various other forcible means of self-help were legal institutions, available to a member of the family of nations who dared to use them in support of any colorable claim. Forced consent was a basis of legal right. Conquest was a legitimate title. The interests of neutrals always were subordinated to the essential interests of belligerents. Any state had the legal liberty to wreck civilization by waging war independently of the consent of the rest of the world. The earnest advocate of peace can see no hope in this old law of anarchistic principles. It is his belief that the spirit of the new law should not be a jealous desire to preserve complete liberty of separate action in pursuit of national interests, but a zeal to keep the peace by a reconciliation of interests, and that this zeal will mold a law very different from the old.

The essential foundations of an enduring new order are (1) the abolition of war as a legal institution; (2) a careful restriction of the legal right of self-help; (3) a program for peaceful settlement of controversies; and (4) a sufficient organization for continual coöperative study and discussion of matters of international concern, especially those which threaten to disrupt amicable relations. Until these four essentials are obtained and are supported by a stable dominant public opinion, the peace of the world will be insecure. The latter two of the four, we probably shall see established soon. Indeed in these particulars the world has come a long way since 1914. But the effective force of public opinion in some of the great nations, including our own, postpones the attainment of the first two essentials. Like most of

the other fundamental problems of international affairs, the peace puzzle is not a legal, but a political, one. Our original thirteen states had to learn the necessity of yielding some of their individual independence for the common welfare by bitter experience, and there was much straining against the barriers for many years after the adoption of the Constitution. We must expect some similar period of tribulation during the education of our great peoples to the acceptance of international coöperation and curtailment of national rights as the necessary price of a just peace; but when, if ever, they develop a passion for peace, the foundations of an enduring peace will be laid quickly.

Meanwhile the optimist believes that as far as possible the legal system of war should be ignored in the formulation of law, in the hope that it will die of desuetude if the new adventure prospers; that in a project for improving the chances of peace, it is bad policy to give a chief place to a rehabilitation of that ancient institution. He can add the argument, supported by recent events, that the Great Powers probably could not reach further agreements on any considerable part of the law of war and neutrality. Their prospective belligerent interests are too diverse and too important to permit of compromises that might endanger national life. It is certain that any agreement reached would not stand the test of a great war, and in little wars the neutrals are strong enough to protect themselves and to make the pressure of public opinion effective without, or in spite of, new legal rules.

The part of the pedantic old law of peace which will survive, will be a builder's scaffolding from which the new work must be attempted. I need not explain to this learned body that only visionaries can hope to win peace by a program confined to the adoption of a mechanical jurisprudence functioning only through the meagre conceptions of independent jurisdictions and free self-determination, slightly tempered by comity and respect for foreign lives and property. Out of continual conferences will come restriction after restriction on the legal liberty of individual states, voluntarily assumed, which will not jeopardize their vital interests, but will advance the common welfare of their peoples. The future law will be largely a multi-treaty law, covering many matters of conflicting or mutual interests and determined by negotiation to adjust those interests. Consequently much of the most important law will not be universal or even general, and I see no urgent reason why it should be. Indeed much of the peace-time law of the nineteenth century rested on treaties between two or only a few states. The new law is not to be a schoolman's law, simple, orderly, and precise, packed in neat Austinian concepts, easy to teach and easy to learn. Rather it will be for many years an uneven, unsystematic, and increasingly difficult law, with a sphinx-like capacity for proposing puzzles. It is bound to display in its features the effects of the conditions out of which it will grow.

What further bearing have these views on the problem of codification? If their predictions are accepted, it will be conceded that we have to do with

law in its infancy, whose tendencies of growth depend on undetermined contingencies. Is it wise to obstruct that growth by a crystallizing code derived from the habits and prejudices of thought of a passing age? Successful codes are a product of mature law. Certainty, definiteness and coherent system are desirable qualities, but of prime importance is a knowledge of what particular decisions will best serve the ends of law and this knowledge can be gained by a social body only through experience. Furthermore, the peculiarities of international legislation should be realized. There is no international legislature and it will be long before one appears. Meanwhile in the new order, as in the old, no state will be bound by a legislative fiat without its consent. If a code is adopted by treaty, it cannot be altered or nullified except by common consent or in accordance with express or implied reservations of power. The inconvenience is comparable to that which the people of the United States would experience if the Federal Constitution could be amended only by unanimous vote of all the States. It was not wholly unfortunate that the old law was indefinite or disputed on so many important matters, that in large part it was only an arsenal of talking points for foreign offices; for thus the way often was open for a fairer and better spirited outcome by compromise or concession than would have been possible if one party could have insisted obstinately on a clear technical right regardless of harm to the other and of the resulting public resentment. Would it not be well to leave some matters of international law in a state of beneficent uncertainty, awaiting the slow development of international organization, interests, and spirit which will make it possible to define with greater assurance against mischief? In the mature law of private rights, uncertainty is an unmitigated nuisance, but this professional dogma will not hold true of early constitutional law. The flexibility of the Constitution of the United States has preserved it through considerable stresses and strains, but at times public resentment at its prohibitions has been tremendous; and we have lived under it as one people, not many diverse peoples. It is important to remember also that law is not an end in itself, but a means to ends, and that legislation is effective only through what men do as a result of it. In international affairs the good-will of peoples is a more important factor for peace than any legislation that can be devised, and any legislation which ignores the end of popular good feeling, will become sounding brass or a tinkling cymbal.

But should there be no present efforts at codification then? Certainly there should be. The old general law needs an expert revision and amendment in the light of the purposes and spirit of the new order, but in determining what formulations shall be adopted by legislation, the motto should be "Rather too little than too much." A complete code would meet with insuperable political difficulties at present unless it strongly emphasized the independent jurisdictions and liberty of action of the individual states. Indeed almost every important problem of the code would have a political

fringe at least, which would make satisfactory legislation a heavy task. Wherever there is pressing need for legislation or it is clear that definition officially certified will entail no future mischief, let us have legislation, if we can get it, but this does not mean complete codification. It means cautious partial codification with some amendment. There are a number of topics on which the law could be formulated advantageously in accordance with these principles. I need not name them. The list of subjects under investigation by the League of Nations Committee of Experts for the Progressive Codification of International Law is an excellent preliminary selection.

What is the most efficient method of formulating the new international law,—treaties, uniform legislation, uniform official declarations of the individual states, or an unofficial code of persuasive influence? I suppose that no one would expect a simple, categorical answer. An intelligent answer must recognize the peculiar problems of the various phases of the law, and especially their indeterminate factors. Accordingly it must be qualified, complicated, and in part provisional. At any rate we can rest assured that future practice will not be dictated by doctrinaires, but by the immediately impinging forces of expediency. A few general considerations are all that I purpose to give, for the time allotted is expiring. Treaties are the appropriate method for enacting the stabilized part of international law, since a treaty raises an obligation to abide by its declarations and is revocable only in accordance with its terms or implications. For some less settled law, however, this method carries those definite disadvantages of inflexibility of which I have spoken.

Uniform official declarations are a convenient substitute where there is reluctance for any reason to assume the obligations of a treaty, but willingness to have affairs governed for the time in accordance with agreed stipulations. However, when states concertedly have committed themselves to rules by formal declaration and international affairs have been conducted in accordance with them for years, a state may find as much embarrassment in withdrawing approval for the future as in the case of treaties.

Uniform municipal legislation is an important device for bringing the municipal law of states into concordance in order to promote in each nation a social justice which international competition otherwise would prevent, or to avoid the inconveniences and injustices to individuals which diversity of law often produces, or to insure the uniform fulfillment of the obligations of a treaty. The reformation of private international law will be advanced best in this way; and, in particular, if a solution of the tangle of multiple nationalities is found, it may be made effective thus; for in many of its embarrassing phases, the matter is one of municipal law and not of the law of nations. There has been quite a little preparation of uniform national legislation, and some of it has been adopted by many states. The preparation may be the work of official agents of the governments or of private

organizations. Whichever is the case, the fate of the product will not always accord with its merit. The experience of our own National Conference of Commissioners on Uniform State Laws is instructive. Where there is loud commercial demand for uniformity, the adoption of a uniform draft proceeds rapidly; but where there is not the urge of strong political pressure, the response of the legislatures is sluggish. Legislatures are not interested heartily in exact justice or in perfecting the law. Politics, in the colloquial sense, are their spur and their curb. Uniform labor acts may be adopted quickly in many countries for obvious political reasons, but uniform acts to remedy the inconveniences suffered by a few thousand persons have not the impetus to overcome legislative inertia. Therefore, if wide adoption is devoutly wished, these projects must have back of them either a treaty obligation or a strong political lobby in each country.

Of course, uniform national legislation cannot directly change the law of nations, but much of the law which we have been accustomed to discuss under the caption international law is purely municipal law with a background of international affairs, and there is no doubt that concerted uniformity of municipal law on some topics would obviate international friction and thus serve the cause of peace.

Finally, unofficial critical commentaries and even unofficial codification are most important agencies for molding the new law. They can provide that careful technical study and disclosure of the logic of cause and effect, of purpose and efficient means which should precede legislation. The work of experts always has had some influence on the course of law-making. There has been a great deal of this influence in our field. There will be need for much more of it in the future, for the work of intensive development of international law has only begun, and in unauthorized, and perhaps unrecognized, collaboration with the politician and the statesman, the technical expert will have his full measure of this work. Much of the general law of peace, which is not ripe for legislative formulation, can well be left in the mills of the expert for further grinding. In slowly adapting the old theories to changing conditions; in evolving a new philosophy and a new technic; and especially in the careful study of those particular difficult problems that threaten peace and must be solved by negotiated treaties of adjustment, the international scholars and jurists will continue to vindicate their callings.

The CHAIRMAN. The meeting is now open for general discussion on the subjects just discussed by Professor Garner and Professor Bingham.

Mr. E. A. HARRIMAN. Mr. Chairman, it seems to me that the last speaker somewhat exaggerates the novelty of the new idea of peace. As a matter of fact, the peace movement began with the women of Athens and is well described by Aristophanes in a play which some of you may have seen recently. The movement has continued ever since, with occasional interruptions by Julius Caesar, Napoleon, and Kaiser Wilhelm. But the move-

ment is destined to continue until it succeeds. For that I have the guaranty of Dr. Scott, because the movement is permanently endowed.

I am heartily in favor of the codification of international law. I shall not discuss the question of what the code should contain, how much time should be devoted to a discussion of war and how much to the problem of peace. I wish to call attention, however, to a very practical point in regard to codification.

What part is the United States to play in the codification of international law? That is a very important practical question. What is the present situation? The League of Nations has now a commission at work upon the codification of international law. The United States is not a member of the League and is not represented in that commission because, no matter how eminent the Americans who, as individuals, are at work upon that code, they have no mandate from the United States.

Professor MANLEY O. HUDSON. No member of any commission has a mandate from any government.

Mr. HARRIMAN. But the commission is organized by the League of Nations.

Professor HUDSON. Appointed by the Council, but no member of the commission represents a government.

Mr. HARRIMAN. All members then represent the government which appoints them.

Professor HUDSON. No, they do not.

Mr. HARRIMAN. May I inquire whom they do represent?

Professor HUDSON. They do not represent anybody but themselves.

Mr. HARRIMAN. Then they are responsible to themselves only, which is a very fortunate position. They are responsible neither to their own government nor to the League of Nations, and no matter how eminent those jurists might be, the fact that they do not represent the United States shows that the United States has no part in the present codification scheme.

Recognizing that fact, Mr. Tinkham, member of Congress from Boston, has introduced a resolution in the House of Representatives requesting the President to call an international conference at The Hague to consider the question of the codification of international law. If that conference is called, the persons who appear will represent their governments and in that conference the United States will have a voice. I do not presume to say that any one could possibly prepare a better code than the present commission which is at work upon the subject, but the question is not as to the merits of the code, but as to its effect. We have a very excellent illustration in the Statute of the Permanent Court of International Justice. The Statute was adopted by the Assembly of the League of Nations and then ratified by the nations supporting it. The members of the League or those who signed the protocol were all satisfied with the Statute.

The United States was not satisfied, and the United States Senate has

adopted reservations to the Statute which may or may not improve the Statute. That is a question of opinion. Very many people think the reservations do not improve the Statute. However, the question is not one of improvement, but of the assent of the United States. If we have a code prepared by the League of Nations and adopted by the League of Nations, which of course is not binding upon the people of the United States, then the question will be what the relation of the United States is to that code. Then we will have inevitably further reservations by the Senate affecting that code, just as we have with reference to the Statute of the Permanent Court of International Justice.

Professor HUDSON. Nobody proposes such a code. It is not anywhere proposed in any of the papers on the subject.

Mr. HARRIMAN. What sort of a code?

Professor HUDSON. A code adopted by the League of Nations.

Mr. HARRIMAN. Who is to adopt it then?

Professor HUDSON. I cannot tell you about that unless we go into the whole history of the commission.

Mr. HARRIMAN. I understand it will require ratification, but the point is that the code prepared without the participation of the United States lacks the influence of the United States behind that code.

Mr. GEORGE W. WICKERSHAM. Mr. Chairman, will you allow me, for the sake of accuracy, to challenge that statement? I simply want to mention that the instructions of the committee are to communicate their suggestions to all of the governments, whether members of the League of Nations or not, and to invite from all governments, whether members of the League of Nations or not, their recommendations and suggestions, to the end that ultimately there shall be an international conference composed of all the nations, whether members of the League or not, for the adoption of the recommendations of the committee, whether after amendment or otherwise.

The CHAIRMAN. The Chair will suggest, while he well recognizes the value of remarks which cause immediate protest, that nevertheless, in the interest of carrying on the discussion in an orderly fashion, our members should reserve their objections until after the present speaker has finished, whereupon they will have ample time to have their objections entered of record in the usual manner.

Professor CHARLES G. FENWICK. Mr. Chairman, I would like to raise a point of order as to whether a program including "round table conferences" does not mean precisely that very thing. I thought the idea of a round table conference was that when someone said something perfectly extraordinary which you could not possibly let pass and which you could not answer effectively twenty or twenty-five minutes later, you had the right to express yourself immediately, at the moment. If we are going to turn this into a series of disconnected papers and I am not going to have a chance to get

back at the person speaking until twenty or thirty minutes have elapsed, it is not what I should term a round table discussion.

SEVERAL MEMBERS. Hear, Hear!

The CHAIRMAN. I am inclined to think the opinion of the Chair is not concurred in by a majority of the audience, and that the opportunity for a free-for-all discussion is much preferred. Therefore, Mr. Harriman will permit me to withdraw my protection with reference to his remarks and leave him to the tender mercies of the mob.

Mr. HARRIMAN. The protection having been unsolicited, the offer of protection is withdrawn with my permission.

It is a practical question as to whether the codification of international law should proceed as it is now proceeding under the constitution of the League of Nations, which the United States has refused most positively to join, or whether the codification of international law should proceed by means of an international conference at The Hague, such as has been held previously for the settlement of international questions. That is a practical question.

I think it out of order to suggest any vote on the resolution, but I call attention to the fact that there is to be a hearing before the Committee on Foreign Affairs of the House of Representatives on Monday, May 3rd, at 10.15 o'clock a. m., and if there should by any possibility be anyone here who agrees with me that the resolution of Mr. Tinkham should be adopted, I should be very glad if he would communicate with me sometime during the session.

Professor MANLEY O. HUDSON. Mr. Chairman, I am afraid that I have been a little slow about comprehending the meaning of "codification" as the term has been used by several speakers in this discussion. At times, I thought that Mr. Garner spoke of some kind of a global code. It is quite clear that Mr. Harriman has something of the sort in mind. If by "codification" we mean anything of that sort, then I should certainly want to dissociate myself entirely from the use of that term. I cannot see the slightest possibility, or the desirability for that matter, of drawing up and promulgating a global international code.

Professor GARNER. I stated specifically that I had in mind piecemeal codification. I had not the slightest idea of suggesting what you call a global code. I would be the last person to think such a thing was practicable.

Professor HUDSON. I thought, of course, that that must be your opinion, and yet I must have misunderstood, or probably I did not hear correctly some expression in the latter part of your remarks which made me feel that perhaps I had misunderstood you. Then I will simply confine myself to my friend Mr. Harriman in discussing a global international code. I would much rather do that anyway.

Mr. Garner seems very much influenced by a public demand for codification. We realize that there is some such public demand. I have been

unable to find out that the people who voice it understand what they mean by "codification of international law." I feel quite sure that most of the people who have talked about codification have not had in mind clearly the history of the recent legislative development of international law.

Mr. Garner distinguishes, if I understood him correctly, between a restatement and the legislative process. I cannot believe that the people who are demanding codification would be satisfied by a restatement of much of our substantive international law. I would refer to the projects which are before the committee of jurists set up by the Santiago Conference. Some of those projects, it seems to me, are very unimportant. The codification of the law of piracy, of the law of exploitation of the products of the sea, even the codification of the law of territorial waters, which are under consideration by the League of Nations committee of codification, seem to me rather unimportant by way of meeting this public demand for codification.

It seems to me that our job is to have the people see what is the nature of our problem of developing international law. In the field of substantive law I should very much deprecate the codification of certain topics. Mr. Garner mentioned the difference between domestic questions and international questions, and apparently he thought something might be accomplished by way of a definition of those terms. For my part, I should deprecate any attempt to put that difference into cold language that would perpetuate itself. I should like to refer to what was said by the Permanent Court of International Justice in one of its opinions on that point—in the fourth advisory opinion.

Nor does it seem to me particularly a useful thing—I am inclined to think it might be disuseful—to have a codified distinction between justiciable and non-justiciable questions. I would like to associate myself with what Mr. Bingham said about the great desirability of having some of these questions left undetermined. It seems to me that future progress will be easier if we do leave them undetermined.

I have been rather disappointed that we have not had more discussion in concrete terms of the method of effecting the improvement of our existing international law, for that is what I believe most of us mean by "codification." No doubt Mr. Garner did not intend any disparagement of the methods recently evolved in drawing up multipartite international treaties. I think one must say, at least I must say, that the recent attempts at codification of international law have been rather disappointing. In the first place, I thought it a most fortunate thing that nothing was done in 1920 about the resolution of the Committee of Jurists at The Hague, the committee that drafted the statute of the Permanent Court of International Justice. That committee had in mind a conference to consider the laws of war. It envisaged restatement or modification as a consequence of the experience of the war. If an international conference had been held in 1920

or 1921, it would almost certainly have excluded Germany, and it would almost certainly have restated the law of war in terms of Allied practices during the war.

Dr. JAMES BROWN SCOTT (Interposing). Mr. Chairman, I understand this is a round table discussion and that Mr. Hudson will permit an interruption?

Professor HUDSON. Certainly.

Dr. SCOTT. I think if you will read the resolution of the Advisory Committee, you will find that it starts out with war and ends with the piping days of peace. It looks upon the question of war and the rules to be followed by armies as a very necessary thing. But if you will read Mr. Root's resolution to the end, you will find that it provides for consideration of other matters upon which the codification of international law would be advisable in order to fill out those vast spots unoccupied by agreement. Therefore, I think the first part of your statement is a very timely criticism, but I think you give an imperfect idea, if I may say so, of the opinion of the committee when you confine its recommendations merely to resort to arms.

Professor HUDSON. I thank Dr. Scott very much for correcting me. Of course, I ought to be corrected, because I did not want to create the impression that in my judgment such a conference would have devoted itself exclusively or even mainly to the laws of war. I can only regret, however, that the resolution was framed so that a conference held at that time would have devoted a part of its time to a consideration of the laws of war.

Dr. SCOTT. I think that is a reasonable objection.

Professor HUDSON. That objection, it seems to me, was so powerful in 1920 that nothing was done at that time.

Mr. GEORGE A. FINCH. If I am not mistaken, I think that the resolution to which Dr. Scott referred did not contemplate a single conference, but a series of conferences to be inaugurated and continued from time to time; so that it was not a conference for the year 1920 or any other one year, but a continuing conference which would take these matters into consideration whenever they needed consideration.

The CHAIRMAN. Mr. David Hunter Miller has kindly furnished the text of the resolution, which is after all the best evidence.

Miss HOPE K. THOMPSON. Mr. Chairman, I would like to ask if the text furnished is the original English proposed by the Committee of Jurists, or whether it is the English text which was re-translated from the French and which, it appears, was published in the League of Nations publication?

Mr. MILLER. The origin of the text I have not traced down. The print is from the Pan American Union, Washington, D. C., 1925, page 22. It is entitled "Resolution of the Advisory Committee of Jurists Meeting at The Hague in 1920 Recommending the Codification of International Law," and I take it that it is the original.

The CHAIRMAN. The Chair will decide that, while this may not be the best evidence, it is the best available evidence, and therefore may be used by counsel on this occasion.

Professor HUDSON. I would like to withdraw anything I have said if it is going to take me into a discussion of this text. The recommendation was that "a new conference of the nations in continuation of the first two conferences at The Hague be held as soon as practicable for the following purposes: First, to restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war; second, to formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful of the events of the war and the changes in conditions of international life and intercourse which have followed the war; third, to endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore; and fourth, to consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted."

I think all of my critics are right. Let me take up two recent attempts at the codification of a part of international law. I would very much wish that we could discuss the subject in terms of concrete efforts that have been made, because it seems to me this Society has devoted itself long enough to a discussion of codification in the general sense of the term.

There was, first of all, a treaty drawn up at the Washington Conference concerning the use of submarines. I do not know what the members of our Society think about that treaty. The treaty is not in force today, as I understand it. Am I wrong about that? The treaty has not been ratified. I doubt very much if it will be ratified. I very much doubt if that treaty expresses what we want to see ratified today concerning the use of submarines. I very much doubt, if it were ratified, that it would serve the very useful purpose in the future which it was hoped and intended to serve.

I come now to the second effort. The Washington Conference set up a commission of jurists to deal with two questions relating to the law of war, the one with reference to radio and the other with reference to aërial warfare. That commission of jurists was composed of our very best men, in accord with Mr. Harriman's desire, representing some six governments.

Dr. SCOTT. Including the United States.

Professor HUDSON. Yes. We did not hear anything about the German Government's participation, so far as I remember. That commission met at The Hague in 1922, and it made a long report. Of course, I must say it was an excellent report, though I am inclined to think that I cannot admit that I have seen the full text. Has the text been published?

Dr. SCOTT. Mr. Anzilotti had it published. He had it issued immediately from the official text.

Professor HUDSON. I have seen the text which Mr. Anzilotti published; but our Department of State has not published it, and so far as we are concerned in this country, it remains a document about which we are not to know.

Mr. FINCH. I may say that while the Department of State did not publish the full report, it did publish a very complete summary, which we reprinted in the *American Journal of International Law*.

Professor HUDSON. I am not interested in a summary. I am interested in the report. What has happened since that report was drawn up by the Commission of Jurists? Has anything happened? Has the report been put into effect at all? I am not aware of anything having happened or any government having taken any action.

I come then to the recent history of the Commission of Jurists set up by the Conference of American States. I can only say in the presence of our distinguished guest, Judge Bustamante, and in the presence of Dr. Scott and Mr. Reeves, that it is very disappointing to some of us that their work does not go on faster. If I recall correctly, the Mexican Government first proposed such a commission in 1902. The commission was set up by a treaty signed in 1906. The commission met in 1912 and held one meeting. A second meeting of the commission was set for 1925, but, so far as I know, that meeting has not yet been held. I very much hope it will soon be held.

Our concrete record lends a good deal of discouragement to any attempt at codifying international law by restating the existing law. Why is that? I will suggest one reason: The problems are not really important problems, not as important, I am inclined to think, as some of us have suggested in the discussion here today. There are extremely important international problems, there are extremely important *lacunae* in the existing international law, and in the main, they are being taken care of by the international conferences which always follow the precise procedure that Mr. Garner outlined. I do not understand how he distinguished between the process that he outlined and the process followed by the conferences which have been held, summoned by the Council of the League of Nations.

In a few weeks from now, I understand, we are to have here in Washington a conference of experts, summoned by our government, dealing with the pollution of water by oil. That conference of experts, if it eventuates in any proposal, will submit it to the separate governments and it may later lead to another conference. I think that the world has made in the last few years a most decided progress by way of increasing and bettering the products of international conferences. Conferences have become much more numerous owing to the establishment of the machinery which we call the League of Nations. The United States, I would remind Mr. Harriman, is represented in a great many of those conferences. It is about to be

represented, officially or unofficially, at some six meetings to be held in Geneva during the course of the next month. Those conferences are actually under way.

I think we have made very substantial progress since the war in the development of international legislation, to use Mr. Bingham's term. For my part, I can only wish that this Society would take greater account of that legislation, of its content and of its form. I wish we could have here a discussion of the arms traffic treaty signed at Geneva last June by representatives of the United States and representatives of various other Powers. I wish we could devote ourselves to the concrete problem of getting particular jobs done by way of filling in gaps in our international law. I believe that is a more useful purpose to be served by this Society than the discussion of the codification of international law in general terms.

The CHAIRMAN. I am not sure what the rules are as to time limits in a round table discussion. It will be very difficult for me to maintain any rule, because the committee on arrangements did not consider that I was in any sense an official comparable to the one necessary at a football game, to take out time. I ought to be taking out time on these interruptions in order to do justice to the man who has the floor. However, I shall say that from now on the speakers will be limited to eight minutes. Mr. Miller.

Mr. DAVID HUNTER MILLER. Mr. Chairman, and ladies and gentlemen: I have only three or four rather disconnected points that occurred to me.

There does not seem to be entire agreement as to what the subject of discussion is, that is, as to the meaning of the word "codification." I am not going into that. Whatever it means, if there is any idea—as there seems to be in this resolution in the House of Representatives of Mr. Tinkham's—that the real work of codification can be done at an international conference, I say that the idea is utterly fallacious. It is impossible. It has never been done. It can never be done.

Professor BROWN. May I interrupt, Mr. Miller? Did not Mr. Wickersham suggest to us that all this work of codification was heading up to an international conference?

Mr. MILLER. That is a very different thing. That, I may say, is the contemplation of the resolution of 1920 which has been read here, as is specifically stated there. I venture to say that no fifty men ever did draw a paper, and further, that no fifty men ever could draw a paper. Never has it been done, and never was there a better illustration of it than took place in the House of Representatives last week when there was a codification of the statutes of the United States passed without any change in the meaning. It was a matter of scissors and paste. It was said in the House of Representatives that no member of the House had ever read the Bill. It was not read in the House except by its title, and was passed, as was stated in the debate, because it was to be taken on faith.

That was a simple matter with reference to the statutes of the United States, as they existed, or are supposed to have existed, on the 7th day of December, 1925. So that codification, in any sense of the word that has been used here, is going to be done in advance of action by the governments at an international conference or otherwise.

My second point is that there is not any unanimity about this matter of codification in any of these senses in which the word has been used here. I was quite struck by an article in the London *Times* a few days ago, written by Professor Brierly of Oxford. I want to read a few words from it:

> Few Englishmen sympathize with the idea of codification. They have never felt the impulse to codify their own national law, as have most continental countries, and for the most part, they are either totally uninterested in or unconvinced by arguments that international law should be codified. Our attitude on this question probably results from a general disbelief in the possibility of converting at all rapidly into legal relationships what are at present the predominantly political relationships between states.

So, there is another point of view, although it is added here: "The truth is that we stand virtually alone in maintaining this attitude."

Still, the British Empire, even standing alone, is of considerable importance.

Dr. SCOTT. It is an attitude.

Mr. MILLER. It is an attitude, as Dr. Scott very justly observed.

Now, the third point. One of the ideas of codification seems to be, whether it is global or otherwise—an idea that perhaps is not expressed as much as it is assumed—that there is going to be a statement of the law, global or otherwise, and that is to be the end of it. Nothing could be more fallacious than that. I venture the assertion that no man, however wise, and no committee, however learned, could now make a final statement as to any portion of international law that would be permanent. There seems to me to be required—and I would put it as one of the foremost and most important points of any codification—an opportunity for change. If, for example, a treaty is to be entered into, there must be a limited term, or a possible limited term for the treaty. Any idea that the law can be, even in part, finally stated now so that it will be good forever after, is as much a mistake as it would be in municipal law to say that you could state the law beyond possibility of change in the future.

I have one other point in mind. One of the speakers referred to several series of technical experts that should be consulted besides lawyers. I quite agree. I want to add one sort of scientist that I do not think is often enough thought of by international lawyers and in international discussions, and whose services, it seems to me, would be essential in the codification of parts of international law. I was struck with that in looking over some of the projects of the Pan American Union. He is the geographer. We

do not think enough of him. There are several of these projects for the change or restatement of international law that should be submitted to the geographers before they are passed on finally, even by the lawyers.

Mr. ARTHUR K. KUHN. Mr. Chairman, and ladies and gentlemen: It seems to me that there is a great deal of difficulty before the nations, particularly the United States, in the matter of codification, for the reason that there is a lack of definition as to the function of the League of Nations. It is not a single function. It is, at least, a double function, that of a political body, of which the United States is not a member—and some of the speakers have said this morning that it is decisively never to be a member—but it is also an administrative body, a great administrative union, in which fifty or more nations carry on the business of their international relationships and in which the United States has also taken a part.

The United States takes advantage of the registry of treaties furnished by the League of Nations, and, as Mr. Hudson has stated, has taken part in a number of official conferences on separate topics, and undoubtedly will continue to do so. Now, the function of preparing the way for a progressive codification of international law by separate topics is, to my mind, an administrative function of the League of Nations, and the nations of the world understand that it is such a function. Mr. Wickersham has stated to us this morning that the method of procedure is well understood; that it is preparatory work which is to progress by close contact with the nations of the world, whether adherents to the League or not.

But I think that there is important spade work to be done in clarifying this particular function of the League, and before the United States can take a worthy place in coöperation in respect to codification, there should be a wider understanding that this work has no connection whatsoever with the *political* organization of the League. The intention is that it shall be a world-wide codification, and not a codification of international law as practised by the members of the League of Nations.

Professor FENWICK. They, however, constitute most of the nations of the world.

Mr. KUHN. Quite so, I agree to that; but it is not well understood in this country that this work is not allied with the political organization of the League, except so far as the Council, of course, oversees the appointment of the committee and the work that they are doing.

I am coming to a more important point, and that is that the United States might very well take an official attitude upon this question of codification, and the League of Nations might very well take an attitude towards the United States to the end that both parties may meet upon a common ground in the work of codification. This may be accomplished on the one hand through some official *démarche* on the part of the League to express the separation of the work that is being done in codification from its political activities, and, on the other hand, if that *démarche* is taken, and the United

States understands it as such, I have no doubt that proper steps can be taken from within our government to coöperate upon that basis.

The President of the United States, in his last annual message, has given his encouragement in the work of codification. If I remember rightly, he devotes several paragraphs of that message to the hope that jurists working in committees will pave the way for a codification of international law.

Professor HUDSON. May I ask Mr. Kuhn to be more specific about how the Government of the United States might coöperate? That is not clear to me, in view of the nature of the commission.

Mr. KUHN. I shall be very specific. I make the proposal now that the United States be officially represented on that commission, provided it can be clearly understood that it is administration work carried on by the League and not connected in any way with its political activities.

Mr. WICKERSHAM. May I say a word right there? No government is officially represented on the committee at present, under the resolutions of the Assembly and Council of the League. May I also add that the *démarche* that Mr. Kuhn refers to was taken in the formulation of the resolution which provided for the appointment of this committee, to consist, not of representatives of states, but of lawyers representing the different systems of jurisprudence of the world. It further provided for the communication of their suggestions to all the governments, whether members of the League or not, soliciting from them their comments and suggestions, to the end that ultimately, such an official convention as has been referred to by Mr. Kuhn and others shall be held, in which it is hoped that the United States and all other nations, whether members of the League or not, shall participate officially.

The CHAIRMAN. May I ask if Mr. Wickersham will be good enough to state the size of this preparatory committee for the progressive codification of international law?

Mr. WICKERSHAM. Theoretically, seventeen; actually, fifteen members.

Dr. SCOTT. Mr. Chairman, might I interrupt Mr. Kuhn and the frontal attack which was proposed here at the moment I arose? Would it not be a good idea, in view of the confusion which seems to exist in some minds about these matters, to request the speaker, or Mr. Miller, who makes a specialty of carrying these documents upon his person, to have the text of the resolution read? Mr. Wickersham and others have given an admirable summary of it, but if we have the text, it will prevent a great deal of misinformed opinion being expressed about its terms. It is an admirable statement, and I think we all ought to be in favor of it, but it would be a good thing to have it read.

The CHAIRMAN. Has anyone a copy of the resolution here? Otherwise we will have to depend upon Mr. Kuhn's memory.

Mr. KUHN. I only have one or two further statements to make.

Professor HUDSON. I have a question about what you have just said. I would like to ask Mr. Kuhn if it would be in line with what he has in mind

for the Government of the United States to agree to pay a part of the expenses of the committee of experts for the codification of international law?

Mr. KUHN. Taking the precedent of the reservation made by the Senate with regard to adherence to the Permanent Court of International Justice, I assume that the United States desires, through its treaty-making body, to take part in the burden of expense of any international activity in which it is taking an official part.

Professor HUDSON. Such as the Opium Conference?

Mr. KUHN. Yes.

Mr. HARRIMAN. Will you tell us the relation of the Pan American scheme of codification to your proposal?

Mr. KUHN. I am afraid that I would rather leave that to Dr. Scott, who has the text and knows exactly the official status of the conference.

Dr. SCOTT. I would be glad to turn it over to Dr. de Bustamante.

Mr. KUHN. I am discussing, for the moment, the codification undertaken under the auspices of the League of Nations; and to cut the Gordian knot, if there is a knot, I have in mind the ultimate action of the United States. Ladies and gentlemen, the ultimate action of the United States depends very largely upon the understanding by the public of what the specialists are doing at the present time. If this work goes on for months, and possibly years, without our active official participation to the extent that it may be official within the purview of the resolution as stated by Mr. Wickersham, I am sure, though I do not claim to be a prophet, that the possibility of our ever taking part in that work eventually, will be very greatly minimized. We know that governments do not like to come in and accept things which other governments have done without the opportunity of having come in, to use a financial phrase, "upon the ground floor"; and it is simply with that ultimate object in mind that I make the suggestion, that at the earliest possible moment the United States take part in this work upon equal terms with the other governments.

It makes no difference that they say the committee is not an official committee. I have no doubt that it is not an official committee, but it is working in closer coöperation with the members of the League of Nations, so far as I have been able to ascertain, than it is with nations that are not members of the League.

Miss THOMPSON. I would like to ask a question. How many members of the committee of the League of Nations are subjects of monarchical states, and how many are citizens of republics?

The CHAIRMAN. If Mr. Kuhn is unable to answer that, I think we will have to turn again to Mr. Wickersham, if that is a part of his statistical information.

Mr. WICKERSHAM. I would like to say that one of the most active, useful, and influential members of that committee is a representative of the state of Salvador, one of the smallest countries in the world. That gentle-

man, Doctor Guererro, happens to be a citizen of that state, but he, no more than I, is here as a representative of the government of that state.

Professor HUDSON. May I ask Mr. Kuhn a question? Would it be in line with what Mr. Kuhn is suggesting for the Government of the United States to ask to have a representative sit on the Council of the League of Nations whenever the Council considers any question relating to the business of this committee? I do not see how else the thing that he has in mind is to be accomplished. There is at the present time no inequality of any kind between the treatment of the members of the League of Nations and nonmembers of the League of Nations, so far as Mr. Wickersham's committee is concerned, except that when the Council adopts or acts upon a report of that committee, the United States is not represented. I would like to ask whether that is the suggestion he is making.

Mr. KUHN. I make no such suggestions. In fact, I would not favor it. I do not believe it would meet with favor with those in authority in the Government of the United States. But I think a *modus vivendi* could be arrived at in matters of administrative action by which the United States could be apprised, and take a part in the activities that are conducted under the auspices of the League of Nations, without having a seat in the Council.

Mr. WICKERSHAM. May I call Mr. Kuhn's attention to the fact that an opportunity not only has arisen, but has been presented to the United States, in common with all other governments at the present moment, to take this active official part, because there has just been transmitted to the Government of the United States, as to the governments of all other states, whether members of the League or not, the suggestions adopted by the Committee of Experts on the Progressive Codification of International Law, together with the various reports presented to that committee by its subcommittees, and the Government of the United States is officially asked for an expression of its opinion as to the tentative conclusions reached; and, so far as humanly possible, the opportunity has been given to get official coöperation by the United States as well as by Germany and by every other country, whether members of the League or not, in this preliminary work of this unofficial committee, upon which I, as an American, have just as official a relation to the Government of the United States as has any other member of the committee, that is none at all.

Mr. KUHN. I hope that Mr. Wickersham understands that my remarks are not of a critical nature, but are designed to be constructive merely. I think it is of the greatest importance, in view of what he has just stated to us, that the enlightened opinion of the United States should now be stimulated, as far as possible, to make this distinction which I have tried to emphasize. I do not believe it is very widely understood that this committee is working as a representative of all the nations of the world in order to do the spade work necessary before an official conference can be called.

Mr. WICKERSHAM. I agree entirely with Mr. Kuhn, and I did not arise to criticize what he said, but to supplement it and to emphasize and make clear the fact that this official approach to our government, as such, has been made. I welcome the opportunity to discuss here and in any other public way what has been done and is being done, and to emphasize the invitation extended to the United States to take part in that work. I sincerely hope the Department of State will give serious consideration to the communications that have been sent to it, and will give its aid in making clear and effective the work which is being done.

Mr. KUHN. Mr. Chairman, I have nothing further to say on this point. I thank Mr. Wickersham for the statement he has made. He has given enlightenment which no outsider could have given as to the processes of the committee.

There is only one other suggestion I have to make, and that is with regard to the actual work of codification, especially in view of certain of the statements made, particularly by Mr. Miller, that codification is likely to be inflexible. I believe that in many of the *projets* which are under consideration, an opportunity should be taken to draft *projets* which, by their nature, are not necessarily inflexible, but which may be permanent with respect to statements of principle, leaving, in an annex, let us say, certain restatements or codifications of law by way of legislation, which may be amended from time to time. As a specific example I cite the Aërial Navigation Convention of 1919, referred to by one of the speakers. In this convention a number of principles are laid down, and then reference is made to an annex, which is changed by conference over periods of five years, I believe. That precedent, I think, could be used to very good advantage, particularly on the very projects which have already been approved by the commission as probably ripe subjects for codification—for example, extradition. We know that the law of extradition varies from time to time, in respect to the interpretation of crimes, punishment of crimes, and the list of crimes considered proper subjects for extradition between states. I make that as a constructive suggestion for the actual work of codification.

Mr. HOWARD THAYER KINGSBURY. Mr. Chairman, and ladies and gentlemen of the Society: I shall take but a very few moments. I want to express my hearty concurrence with all of Mr. Kuhn's suggestions and arguments.

I wish also to add one supplementary suggestion, perhaps of a negative character, to the points which he has so ably made. It is sometimes easier to agree on what should not be done than to agree on what should be done. I personally should like to see the fullest kind of coöperation, both official and unofficial, between the United States and this undertaking that is proceeding under the auspices of the League of Nations for the codification and statement of international law. There has, however, been so much hostility to the League in its political aspects from certain quarters in the

United States that there may be difficulty in bringing about such official coöperation as will be wholly effective.

But, however that may be, however fully we may or may not coöperate with this work proceeding under the guidance of the League, it seems to me that it would be most unfortunate to attempt to set up any rival machinery for the codification and statement of international law under the method proposed by the resolution in the House of Representatives to which reference was made by Mr. Harriman. The task is too great to divide it between two bodies. Whatever is to be done should be done, so far as possible, by coöperation of all who are interested, in whatever degree they may be able to contribute towards the common organization; but if we attempt to have two rival bodies or sets of machinery working towards the same end, complications will be increased, divergences will be increased, and what should be a machinery to bring about agreement would probably result in a machinery to emphasize disagreement.

Mr. HARRIMAN. May I ask the gentleman a question? What is the relation of the Pan American scheme? The gentleman says two different machines are working against each other. What is the relation of the Pan American scheme to this?

Mr. KINGSBURY. I may have misunderstood, but it is my understanding that this resolution to which you referred was for a general conference to be called through the United States, to sit at The Hague, the invitation to be sent to all nations throughout the world.

Mr. HARRIMAN. Yes.

Mr. KINGSBURY. I made no reference whatever to this Pan American machinery. I think that there may very properly be regional conferences, regional associations, to consider problems affecting particular sections of the world alone. I believe that this Pan American conference, or whatever it may be termed, confines itself to American questions, and that there is no rivalry or great probability of divergence.

Mr. HARRIMAN. Is not that the scheme of the Pan American conference?

Mr. MILLER. Mr. Chairman, may I read a text here? I have been accused of carrying around texts with me.

Mr. WICKERSHAM. He wants to demonstrate that he does.

Mr. MILLER. I think this text is the answer to the question. If I am wrong in that, I am subject to correction. (Reading):

> *Resolution Concerning the Codification of American International Law Adopted at the Fifth International Conference of American States, Santiago, Chile, April 26, 1923.*
>
> The Fifth International Conference of American States resolves:
>
> 1. To request each Government of the American Republics to appoint two delegates to constitute the Commission of Jurists of Rio de Janeiro;

2. To recommend that the committees appointed by the Commission of Jurists be reëstablished;

3. To request these committees to undertake and to reconsider their work in the light of the experience of recent years and also in view of the resolutions of the Fifth International Conference of American States;

4. To designate a committee for the study of comparative civil law of all the nations of America in order to contribute to the formation of private international law, so that the results of this study may be utilized at the next meeting of the Commission of Jurists. It is understood that in the term "civil law" there are included the following topics: commercial law, mining law, law of procedure, etc. Criminal law may also be included therein;

5. To convene the International Commission of Jurists at Rio de Janeiro during the year 1925, the precise date to be determined by the Pan American Union after consultation with the Government of Brazil;

6. To recommend to this commission that in the domain of international law the codification should be gradual and progressive, accepting as the basis the project presented to the Fifth International Conference by the delegate of Chile, Mr. Alejandro Alvarez, entitled *La Codificación del Derecho Internacional en América;*

7. The names of the delegates referred to in clause 1 should be communicated to the Government of Brazil and to the Pan American Union;

8. The resolutions of the Commission of Jurists shall be submitted to the Sixth International Conference of American States, in order that, if approved, they may be communicated to the Governments and incorporated in conventions;

9. To recommend to the Commission of Jurists, which is to prepare an American code of private international law, that, if it should consider it advisable, it decide previously the juridical system to be adopted or systems to be combined as a point of departure for the rules tending to avoid or resolve conflicts of law, and that it instruct to that effect the special committees appointed to draft said code, and that it take into consideration the motions submitted to the Fifth Pan American Conference by the delegations of Argentine, Brazil, and Uruguay, as well as any others that may be suggested.

This recommendation shall be transmitted immediately to the respective Governments, in order that they may in turn be transmitted to the delegates who will form part of the committees on private international law.

Professor GEORGE GRAFTON WILSON. I merely want to ask Mr. Miller a question as to the text which he is reading. In the first place, I would like to know whether the English, the French, or the Spanish is the official text of this document.

Mr. MILLER. I am reading from this paper issued by the Pan American Union. It is not here stated what the official text is.

Professor WILSON. I notice also in this text which you are reading that the approval, in general, is prior to the documents that are in the text. I would like to ask Mr. Miller if he has read the whole of this document.

Mr. MILLER. Yes, I have.

Professor WILSON. Would you suggest, Mr. Miller, that it be made the basis for discussion by the American Society of International Law, as presumably this Society might have an interest in the codification of American international law, if such a thing exists?

Mr. MILLER. I do not quite understand the question, as to the basis of discussion.

Professor WILSON. For this Society.

Mr. MILLER. The basis of discussion for what?

Professor WILSON. In regard to the codification of international law.

Mr. MILLER. No. I would not make that suggestion. I would suggest that this might be considered by the Society, but not as the basis of discussion for the codification of international law.

Professor WILSON. When you were speaking I understood you to state that it would be desirable to have something concrete, but this is not what you would recommend as an evidence of concrete material for discussion.

Mr. MILLER. I think that these are concrete proposals which should be discussed, but I do not recall saying that I thought that there should be any concrete proposal in general as to the codification of international law before there could be discussion of it. I certainly intended to suggest no such inference. I agree entirely that this should be discussed. I do not agree that it should be the basis of a discussion for the codification of international law in the broad sense.

Professor HUDSON. May I ask Mr. Kingsbury a question? I should like to ask Mr. Kingsbury whether, in his judgment, if Congressman Tinkham's resolution should be adopted by both Houses of Congress, if it should be approved by the President of the United States, and if invitations to such a conference should be issued by the Government of the United States, other governments would be prepared at this time to accept the invitations and to go on with such a conference.

Mr. KINGSBURY. That calls for the exercise of prophecy rather than judgment, it seems to me, and I do not attempt to qualify as a prophet; but, so far as I can make any guess on the subject, it is that the other nations would not be especially cordial toward such an invitation in the present state of affairs.

Mr. KUHN. Mr. Chairman, I think Mr. Hudson would be the best qualified to answer his own question.

Mr. WILLIAM H. BLYMYER. Mr. President, and members of the Society: I came here with the purpose of saying something with regard to the codification of international law—rather against it. The last time that I was here I spoke against the adhesion of the United States to the Permanent Court of International Justice, and found myself greatly in the minority.

This time I do not wish to say anything, if I could, in disparagement of the work which our guest from Cuba has had on his shoulders for years

and has borne so well, but I am afraid that what I do say will be very much in accord with the general sentiment expressed by the speakers who have preceded me.

It seems to me that the question of the general codification of international law must be deferred for a great length of time, perhaps for hundreds of years. I think, from experience, that it can not be expected that a code will cover all questions of international law, and there will be great *lacunae*, as has been said here, in the codification. That will mean, that ever behind the system of code law there must be kept in mind the system of common international law, or international law as it has arisen, based on common sense.

We have attempted something very much like that in the State of New York. A few years ago we started to codify or restate the principles of law, taking up one subject after another, and that codification, of course, took precedence over the common law. I happen to have had a case with regard to the Statutory Construction Act, and in particular to the manner in which the computation of time should be made from a given date, as to whether the first date should be excluded and the last included. The Act, however, was defective in this respect, that it simply stated that when periods of days, or months, are computed, the first day of the period should be excluded and the last day included. There was left out, you will notice, the periods of years. This case involved the question of years; and although the reports were full of decisions in which that question had been brought up, and it had always been held that the first date should be left out and the latter taken in, nevertheless, the court of last resort decided that the law was to the contrary: that years not having been mentioned, the rule *inclusio unius est exclusio alterius* applied, and a majority of the court could not be induced to take into account that this was simply a restatement of law, and consequently it applied a rule which changed the existing state of law, by a simple implication contrary to intention, when the correct application of that Roman principle only applies when a new provision of law is being introduced, and the Legislature was obliged at the next session to correct the text.

The same thing is just as apt to happen in an international court, and there will be no opportunity for having it reviewed.

I think that the greatest attempt that has ever been made to catch up the loose threads of a legal system was that of Blackstone, and yet even today in Great Britain Blackstone's efforts are hardly regarded, although they form a very complete and systematic statement of the law of Great Britain and the common law, as we suppose it has always existed there. We would be surprised, I think, to find out by inquiry generally in Great Britain, how little that monumental, though voluntary, codification of the law has affected the practice in that country.

I think, therefore, that everything should be done to encourage discussions of this matter, such as has been carried on for a great many years

in The Institute of International Law in Europe. They furnish a storehouse of discussions that will be very valuable upon occasions when these questions come up and it is necessary to draw upon them hurriedly. For that reason, I hope that these efforts will continue; although I believe, as I have already stated, that it will be a great many years before any of it will be given an authoritative character by the courts. There are certain fundamental questions which will have to be stated before it will be possible to proceed with a world system of arbitration or of justice, but they should be limited, it seems to me, to the smallest number possible so as to secure the full consideration that they require.

Professor CHARLES G. FENWICK. Mr. Chairman, and ladies and gentlemen: So many of my observations on the codification of international law have been anticipated by Professor Hudson, especially the comments I wanted to make on the impossibility of drawing any distinction between the statement of existing law and legislation with respect to new fields, that I feel I can be allowed to forego any remarks upon that subject. There is, however, one point I want to emphasize. Professor Hudson seemed to think that it was desirable that we should concentrate our efforts upon one or two practical attempts at codification, and that we should not discuss general principles.

On the contrary, I insist that it is the general principles of codification that we most need to discuss, because it is on those very points that we need to clarify the issue. The underlying general principles of codification lead us, of course, to the great issue of the existence of the League of Nations. We all know that the moment the name "League of Nations" is mentioned in this assembly, as in other assemblies, a psychological complex is aroused and sides are taken pro and con, and we are asked, as we have just been, whether we believe in monarchical or republican governments, and other such irrelevant questions.

It is a hard fact that the League of Nations does exist; and the United States must recognize its existence. We, as a scientific body, must give up, I think, excusing the United States for its illogical attitude towards the existence of a great international fact. The existence of the League of Nations is the biggest, most important, most far-reaching international fact in the world today. How we can stand aside and consider whether, by doing a thing in this way or in that way we shall be coöperating more or less with the League, passes my imagination.

Let us say, perfectly frankly, as a body of scientists, that there is one way to do this work of codification, and that is to do it with the League. Get into the politics of the League? Certainly get into the politics of the League. Is there any rational man who thinks you can draw a distinction between political and administrative activities of the League? We have been hearing that this morning. How can you distinguish the two? In one breath the President of the United States, in a recent address, told us

that we were to have nothing to do with the political activities of the League, as we had had nothing to do with them in the past; and at the same time we were told that the government was going to send delegates to a disarmament conference. Of all the political questions in the world the question of disarmament is the leading political question. Let us give up this talk of distinction between administrative and non-political activities, on the one hand, and political activities, on the other. Every effort to codify international law leads you inevitably into the political activities of the world. You cannot get away from it, and any distinction between the two is impossible as a practical matter.

The great principle of international law that needs to be changed, as former speakers have emphasized, is that the right of self-defense shall be taken away from nations. The right of self-help must go. We know that the right of self-help can only go by the creation of an organization. Professor Bingham tells us that one of the conditions of codification is an organization of the nations. How did he fail to say that there is an organization today? Whether we like it or not, there is an organization today. No one is going to subscribe to its 100 per cent perfection. That organization, I submit, offers the only possibility by which the right of self-help may be taken away from the individual nation; and until we learn that the organization of the whole group of nations to protect each is the sole condition by which the right of self-defense may be taken away, we shall make no progress towards disarmament. There is no disarmament possible in the world until security is first reached, and there is no security possible except by an organization of all for the protection of each. The League of Nations represents an attempt in that direction. If it is an imperfect attempt where is there a better attempt? That is the great problem for us to discuss.

Dr. SCOTT. May I say just one word? I had the pleasure of sitting here this morning, and while I have never attended a round table before in my life, I hope that the method of the round table will be preserved and that it will be extended, and that these meetings will be run upon the basis of the pride of discussion which always takes place when people deeply interested in subjects meet. No session of the American Society of International Law which I have attended in the past twenty years has been so agreeable, so entertaining, and, I may say, so full of promise. I thought I should like to say that and have it appear upon the record.

The CHAIRMAN. We will adjourn until 2 o'clock.

(Whereupon, at 12.20 o'clock p. m., a recess was taken until 2 o'clock p. m.)

THIRD SESSION

Friday, April 23, 1926, at 2 o'clock p. m.

ROUND TABLE CONFERENCE ON THE CODIFICATION OF INTERNATIONAL LAW IN RESPECT TO NATIONALITY

1. International problems in respect to nationality by birth.

(a) Is it possible to persuade all or most of the principal governments of the world to adopt a single, uniform basis for native citizenship; if so, should it be *jus soli* or *jus sanguinis* or some other rule? Would the adoption of such uniform basis for native citizenship require amendments of Article XIV of the Constitution of the United States and of the provisions in the Constitutions of Latin American countries concerning native citizenship?

(b) If it is deemed impracticable to adopt a single, uniform basis for native citizenship to prevent dual nationality from arising at birth, would it be possible to obtain the adoption of a uniform rule under which dual nationality would be terminated when the individuals concerned attain the age of majority or shortly thereafter? If so, what rule should be recommended?

2. International problems in respect to nationality by naturalization.

(a) Has the right of expatriation, as proclaimed in the Act of Congress of July 27, 1868 (R. S. 1999–2001), been recognized to such an extent that it can now be regarded as a part of international law?

(b) Assuming that the right of expatriation does not prevent a country from punishing its former nationals who have obtained naturalization in another country for offenses committed before emigration, does it prevent punishment for the act of emigration itself where such emigration was prohibited by law?

(c) Should a person who has been naturalized during minority through the naturalization of a parent be allowed, upon attaining majority, to renounce such naturalization and, if so, under what conditions?

(d) Should protracted residence by a naturalized citizen in his country of origin or in a third country cause the loss of the nationality acquired through naturalization or raise a presumption thereof? In this relation, is the provision of the second paragraph of Section 2 of the Citizenship Act of March 2, 1907, satisfactory, so that it may be recommended for general adoption? If not, in what respects should it be changed?

3. International problems in respect to the nationality of married women.

(a) Should the nationality of a married woman as a rule follow that of her husband? If so, should she be allowed, by some affirmative act, to retain or obtain a nationality different from that of her husband?

(b) If the nationality of a married woman should follow that of her husband, in the absence of an election by her of a different nationality, should the nationality of the husband attach to his wife of alien origin immediately upon their marriage, irrespective of residence, or should it attach at the time when she begins to reside in her husband's country?

PRESIDING: Ellery C. Stowell, The American University.

The CHAIRMAN. As we have a very brief period for the papers this afternoon, I will ask you all to be seated. Our topic this afternoon is a round table conference on the codification of international law in respect to nationality. You have before you, I believe, this comprehensive outline of the matters to be discussed. I shall not take any part of the brief time which we have to read it to you. This important matter will be discussed

by two of those who are practising the law of nationality in the United States for our government. Mr. Richard W. Flournoy, Jr., Assistant to the Solicitor, Department of State, has dealt with these questions of international law and nationality for many years. You are all familiar with his writings. He has written some very important articles in the AMERICAN JOURNAL OF INTERNATIONAL LAW, which are particularly interesting. After the discussion by Mr. Flournoy, we shall hear from Dr. Henry B. Hazard, Chief Naturalization Examiner, Bureau of Naturalization, Department of Labor. You all know the important part that the Department of Labor plays in this matter of enforcing the law of nationality in the United States, and these two gentlemen have had practical experience which we should like to get the benefit of here in this conference.

I take great pleasure in introducing, as the first to discuss this matter, Mr. Richard W. Flournoy, Jr., of the Department of State.

Mr. RICHARD W. FLOURNOY, JR. Mr. Chairman, as Professor Stowell says, I have been selected to open this discussion because for a good many years I have been struggling with these problems of dual nationality in the Department of State. I am sorry to say that I have not solved them yet. I do not expect to solve them myself, but the object of our meeting here today is to consider the possibility of solving this very difficult problem.

INTERNATIONAL PROBLEMS IN RESPECT TO NATIONALITY BY BIRTH

BY RICHARD W. FLOURNOY, JR.

Assistant to the Solicitor, Department of State

I have been asked to open the discussion concerning the first topic relating to nationality, which is set forth in the program as follows:

1. (a) *Is it possible to persuade all or most of the principal governments of the world to adopt a single, uniform basis for native citizenship; if so, should it be* jus soli *or* jus sanguinis *or some other rule? Would the adoption of such uniform basis for native citizenship require amendments of Article XIV of the Constitution of the United States and of the provisions in the Constitutions of Latin American countries concerning native citizenship?*

(b) *If it is deemed impracticable to adopt a single, uniform basis for native citizenship to prevent dual nationality from arising at birth, would it be possible to obtain the adoption of a uniform rule under which dual nationality would be terminated when the individuals concerned attain the age of majority or shortly thereafter? If so, what rule should be recommended?*

I suppose that I have been selected to open this discussion because of the fact that I have been engaged for some years in handling citizenship cases in the Department of State and have thus acquired a practical knowledge of the problem. It is very important, indeed, that this problem should be ap-

proached from a distinctly practical point of view. While expressions of opinion by learned writers on international law should not, of course, be ignored, a realization of the character of the cases actually presented is necessary if any good is to be accomplished by this discussion.

Whether or not codification of international law should be confined as to most subjects to a statement of rules upon which there already exists a general agreement among civilized nations, it is believed that codification of nationality laws must go further than this and involve legislation, or rather recommendations for uniform legislation by the various states. The reason for this is that the question whether an individual is a national of a particular country always depends upon the municipal law of that country and is in no case decided by international law. At present international law plays only a minor part in questions of nationality. With regard to nationality by birth, it may be said that it is a recognized rule of international law that an individual who is born in one country of parents who are nationals of another country, and who is a national of the first country under *jus soli* and of the second under *jus sanguinis*, may properly be claimed by both countries, but neither country can enforce its claim when the individual is within the territory and jurisdiction of the other. There is, however, no rule of international law under which dual nationality may be prevented or terminated.

It will be impossible in this discussion, and indeed it would be of little use, to state the laws of all of the countries of the world relating to nationality by birth, but it may be desirable to call attention to the laws of a few of the principal countries, for the purpose, first, of showing their divergency, and second of calling attention to the provisions in some of them for terminating dual nationality. It is only natural that a society of this character should begin with a consideration of our own law, and it is necessary throughout to bear in mind the existing law and apparent needs of our own country first. The question of making changes in laws of nationality, that is, the rules which determine the composition of the citizenship of each country, is obviously a political question of prime importance, in which each country is vitally interested.

As to our own law, it is important to bear in mind that, while it is based primarily upon *jus soli*, it also involves *jus sanguinis*, since, under the provision of the Act of Congress of February 10, 1855 (R. S. 1993), we claim the nationality of persons born abroad of American fathers, provided their fathers have resided in the United States.

The British law is similar to our own, which is based upon it, with regard to the status of persons born within the territory and jurisdiction. The British law contains provisions under which persons born abroad of British parents may, with certain limitations, be claimed as British nationals. Certain distinctions are made between those born abroad of native British parents and those born abroad of naturalized British parents.

The British law contains very liberal provisions concerning election,

under which persons born in British territory of alien parents and persons born abroad of British parents may, after attaining the age of majority, divest themselves of British nationality by making a declaration of alienage. Our own law contains no provision involving the principle of election, except the provision of Section 6 of the Act of March 2, 1907, which requires persons born abroad, who claim citizenship of the United States, under R. S. 1993, to register in an American consulate upon attaining the age of eighteen years and to take the oath of allegiance to the United States upon attaining majority. This requirement, however, specifically relates to maintenance of the right to protection and not to maintenance of nationality.

The laws of the Continental European countries are based primarily upon *jus sanguinis*, but most of them, not including Germany, Austria and Hungary, contain provisions based partly upon *jus soli*. In the discussion of nationality in this society last year, attention was called to the provisions of Article 8 of the French Civil Code, under which all persons born of French parents, whether in France or in foreign countries, are French; likewise persons born in France of foreigners also born there, and persons born in France of fathers born in other countries, provided in the latter cases such persons are domiciled in France at the time of attaining their majority, and unless, after attaining majority, they have elected the nationality of their parents. A provision similar to that last mentioned is also found in the Bulgarian laws.

Under the nationality law of Sweden which became effective January 1, 1925, any person whose father is a Swedish citizen is also born a Swedish citizen. It is also provided in Article 2 of this law that an alien who is born in Sweden and remains domiciled there until he attains the age of twenty-two years becomes a Swedish citizen at that time, unless during the preceding year he has made a formal election of the nationality of his father. The laws of Denmark and Norway closely resemble the law of Sweden.

Under the laws of Germany, Austria and Hungary, nationality at birth is acquired only through descent. Birth within the territory of these countries does not under any conditions confer nationality. *Jus soli* plays no part in the laws of these countries.

Under Article 1 of the Italian law of nationality of June 13, 1912, a child of an Italian father is Italian. Under Article 3 a person born in Italy of foreign parents or born elsewhere of parents who have been residents of Italy for at least ten years, at the time of his birth himself becomes a national of Italy if he resides in Italy at the end of his twenty-first year and within his twenty-second year declares that he elects Italian nationality, or, if he has resided in the kingdom for at least ten years and does not declare, as provided in Article 2 of the same law, that he intends to retain his foreign nationality. This article concludes with a statement to the effect that its provisions shall be applied also to a foreigner whose father or mother or whose father's father were native Italians.

The nationality law of Japan is based upon *jus sanguinis*. However, it contains provisions under which Japanese born in certain countries, if they remain domiciled therein, shall lose their Japanese nationality unless they make an affirmative election to retain it, while those born in other countries, and retaining their domicile therein, remain Japanese unless they formally elect the nationality of the countries of birth.

The Brazilian law of nationality of May 14, 1908, provides that the following are Brazilian citizens:

> Par. 1. All persons born in Brazil, even though of a foreign father, provided he is not residing therein in the service of his country.
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> Par. 2. The sons born abroad to a Brazilian father and the illegitimate sons born abroad to a Brazilian mother if they establish domicile in the Republic.
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> Par. 3. The sons born to a Brazilian father while abroad in the service of the Republic even if they should not come thereto to take up domicile.

As pointed out in the discussion last year, the laws of the majority of the Latin American countries resemble the law of Brazil, that is, they require persons born abroad of their nationals to take up their domicile in such countries before they can be regarded as nationals thereof.

A bill now pending before the Finnish Diet contains a provision under which a person born abroad of a Finnish father may lose his Finnish nationality when he reaches the age of twenty-two years unless he has taken up his domicile in Finland or has served in the Finnish Army or has attended a school in Finland for two years.

The above statement sufficiently indicates the great divergence between the laws of various countries concerning nationality at birth. As to the matter of election at majority, it is quite clear that it cannot be regarded as a rule of international law. It is merely a principle, which has been embodied in various forms in the municipal laws of a number of countries. Election to retain or abandon the nationality of one country under its law does not necessarily affect the status of an individual in another country of which he was born a national. It is interesting to observe, however, the important part which domicile has in most of these laws in the matter of terminating dual nationality.

Within the past two years the subject before us has been considered at three international conferences. At the meeting of this society last year there was some discussion of a project for a Pan American Code of Nationality adopted by the American Institute of International Law in December, 1924. The subject was also discussed at a meeting of the International Law Association at Stockholm, September 8 to 13, 1924, and resolutions were passed recommending the adoption of an international code, in the form of a Model Statute and a multilateral convention. The subject was taken up last year by the Committee of the League of Nations on Codification of

International Law, of which a distinguished member of this Society, Mr. Wickersham, is a member, and the Subcommittee on Nationality Laws reported in January last.

The project of the American Institute of International Law was criticised by the present writer last year, first, because it was limited to countries of the Western Hemisphere, whereas the serious conflicts nearly always arise out of claims made to the same individuals by countries of the Western Hemisphere and countries of the Eastern Hemisphere; and, second, because it provides that persons born in an American Republic of alien parents may on reaching majority elect the nationality of their parents, even though they remain domiciled in the country of birth.

In the Model Statute proposed by the International Law Association it is surprising to find that nationality at birth is based primarily upon *jus soli*. This indicates a considerable change of opinion among the publicists of European countries since the discussions of this subject at the meeting of the Institute of International Law at Oxford in 1880 (*Annuaire*, V, pages 41–57), at the meeting at Cambridge in 1895 (*Annuaire*, XIV, pages 66–76, 194–200), and at the meeting at Venice in 1896 (*Annuaire*, XV, pages 233–269). In the meeting at Oxford there appeared to be a general agreement that *jus sanguinis* would furnish the only satisfactory basis for uniform nationality laws, although in the meeting at Venice certain minor concessions were made to the principle of *jus soli*. The Model Statute recommended by the International Law Association, after providing that "every child born within the territory of a conforming state shall become a national of that state," goes on to provide that an election of the nationality of the father may be made by the latter in behalf of the child.

It appears to the writer that the rule proposed by the International Law Association is also subject to the second objection, mentioned above, to the rule proposed by the American Institute. It does not seem reasonable that a person born within a country should, while remaining domiciled therein, be divested of the nationality of that country, either by his own act or by the act of his parent. As to our own country, there are millions of persons in the United States who were born in this country of alien parents. It is believed that this country would never agree that such persons should be divested of their American nationality while they remain domiciled in this country.

The Subcommittee of the League of Nations seems to have despaired of devising any rule for preventing or terminating dual nationality which would be acceptable to all or most countries. The proposed convention prepared by it merely contained a statement, in Article 1, to the effect that a person having dual nationality can not be protected by one of the countries claiming his allegiance against a claim made by the other, and, statements, in the following four articles, concerning the status of children of diplomatic officers and other officials, children of unknown parents or parents whose nationality

is unknown, children born abroad who have not their parents' nationality, and persons having dual nationality who are in third countries. It is to be regretted that the League of Nations Committee did not, in spite of the difficulties involved, attempt to formulate a rule under which dual nationality might be terminated, if not prevented.

Returning to a consideration of the classes of cases involving dual nationality with which our own government is chiefly concerned, it may be said that they involve almost entirely persons born in the United States of alien parents. Comparatively few cases relating to persons born abroad of American parents are presented. Typical cases are those of Czechs and Poles who were born in the United States of unnaturalized parents, and were taken by them in early childhood to the countries of their origin. As a rule such persons do not apply to the Government of the United States for passports until they have reached the military service age.

Another class of cases which give considerable trouble is composed of persons who were born in the United States of unnaturalized French parents and who, although they have been domiciled in the United States since birth, have reached the age of majority and intend to remain permanently in the United States, are still claimed by France as French nationals and are unable to visit France as American citizens.

Little or no difficulty arises in cases of persons born in the United States of British or Latin American parents. Difficulties arise chiefly in countries whose laws are based principally upon *jus sanguinis*. These are usually countries which maintain large standing armies and have compulsory military service in time of peace as well as in time of war. Thus militarism is the root of the evil in most cases. The countries maintaining large standing armies deem it necessary to maintain the greatest man power possible, and they seek to do this by retaining the allegiance of the children of their nationals without regard to place of birth or domicile. Therefore, the problem before us is bound up to a considerable extent with the problem of disarmament. So long as large standing armies are maintained it will be difficult, if not impossible, to persuade countries to abandon *jus sanguinis* carried to its extreme limits.

Another practical reason why it will be difficult to obtain general agreement to the rule of *jus sanguinis* lies in the activities of the most important countries of the world toward the promotion of foreign commerce. This requires their nationals in large numbers to reside in foreign countries, and it is only natural that such persons should desire that their children should have their nationality. For this reason it is doubtful that either Great Britain or our own country would agree to a flat rule based upon *jus soli* alone. However much we may think of the rule of *jus soli* as a reasonable rule for determining nationality in general, it is hard for us to conceive of American merchants or bankers residing in Greece or China, for example, and raising children who are Greek or Chinese. It is important to bear in

mind the fact that, while the nationality laws of all countries contain provisions embodying in one form or another the principle of *jus sanguinis*, the laws of several countries do not contain *jus soli* in any form. On the other hand, it is quite certain that our own country would be unwilling to adopt a rule based solely on *jus sanguinis*. Aside from the fact that it would require an amendment of Article XIV of the Amendments to the Constitution, it would add enormously to the body of aliens residing in the United States.

In the discussion of last year the writer suggested the possibility of general agreement to a rule whereunder the nationality of a person would depend upon the domicile of his parents at the time of his birth. Under such a rule a person born in the United States of French parents, temporarily residing or sojourning in the United States, would be French, and not American, nationals, but a person born in the United States of French parents domiciled in the United States would be a national of this country and not of France. Such a rule would seem logical and reasonable. There are two objections to it, however. In the first place, it would be difficult in some cases to ascertain where the domicile of the parents was at the time when the children were born. In the second place, it would involve amending the Constitution of the United States and the constitutions of the Latin American countries and changing the time honored common law rule of Great Britain. It is believed that the second objection is well nigh insuperable, at least for the present.

All things considered, it does not seem likely that any rule governing nationality at birth can be formulated which would meet with general acceptance in the immediate or near future. We are thus brought to the consideration of the second topic for discussion, that is, the question whether it is possible to obtain the adoption of a uniform rule under which dual nationality would be terminated when the individuals concerned attain the age of majority or shortly thereafter. Aside from the apparent impossibility of settling upon a uniform rule which would prevent the status of dual nationality from arising at birth, there are perhaps some reasons for arguing that the condition of dual nationality, however anomalous and objectionable it may be in the cases of persons of mature age, is not entirely objectionable in cases of children born in a country of which their parents are not nationals. It may be contended that such persons should be in a position upon reaching the age of maturity to choose for themselves whether they wish to retain the nationality of the country of birth or the nationality of the country to which their parents belong. It is believed, however, that such election should be compulsory, so that no person could continue indefinitely to be a national of two countries. Furthermore, as nationality involves duties to the state as well as rights, it is believed that the election should depend upon the actions of the persons concerned rather than upon mere declarations by them. To be more specific, it is believed that the domicile of the person concerned at or

shortly after the time when he attains his majority should determine his nationality thereafter. Perhaps it would be reasonable to allow a period of one year after attainment of majority within which the choice could be made. The proposed rule might be stated as follows:

> A person who is born a national of one country under *jus soli* and of another country under *jus sanguinis* shall, after reaching the age of twenty-two years, be held to be a national only of that one of the two countries concerned in which he is domiciled, that is, maintains a place of general abode, when he reaches the age stated. If such person is domiciled in a third country at that time, he shall be held to have the nationality of that one of the two countries claiming his nationality in which he was last domiciled.

It may be objected that the proposed rule would be too drastic and cause inconvenience to some individuals who would be affected by it, but it would be impossible to devise any rule which would suit the convenience or the whims of all persons affected by it, and at the same time recognize the just demands of the states concerned.

It may be contended further that the countries maintaining large standing armies would object to the proposed rule. The answer to this is that they might object to any rule which would have the effect of decreasing their man power. They might be persuaded, however, that the effect of the proposed rule, or some other reasonable rule for terminating dual nationality, would promote mutually beneficial international intercourse without decreasing their man power to a really serious extent.

It is hardly necessary to say that, in view of the great diversity of national laws and national interests involved, the desired end cannot be accomplished in a day. Prolonged, persistent and patient effort, with a spirit of liberality and conciliation will be required.

The CHAIRMAN. Mr. Flournoy just discussed the first of the three topics, which was "International problems in respect to nationality by birth." The remaining two topics are now to be discussed. The second topic is "International problems in respect to nationality by naturalization." The third topic is "International problems in respect to the nationality of married women." As I announced to those who were here at the beginning, the discussion is led by Mr. Flournoy, of the Department of State, whom you have just heard, and by Mr. Hazard, of the Department of Labor, both experts in this field.

I take great pleasure in introducing Dr. Henry B. Hazard, of the Department of Labor.

INTERNATIONAL PROBLEMS IN RESPECT TO NATIONALITY BY NATURALIZATION AND OF MARRIED WOMEN

By Henry B. Hazard

Chief Naturalization Examiner, Bureau of Naturalization, Department of Labor

With the understanding that the purpose of the conference is to stimulate discussion and exchange of opinion, the following comment upon the assigned portion of the topic—"International Problems in Respect to Nationality by Naturalization and of Married Women"—is intended to further that aim. Such comment, based in part upon conditions which have arisen in practice, may possibly be helpful in the attempt to solve some of the vexatious questions presented.

At the outset, it should be stated that the views expressed are the writer's own and do not profess to represent those of the Bureau of Naturalization or the Department of Labor.

2. (a) *Has the right of expatriation, as proclaimed in the Act of Congress of July 27, 1868* (Revised Statutes, Sections 1999–2001), *been recognized to such an extent that it can now be regarded as a part of international law?*

During the early years of this Republic, conflicting views were held by both administrative and judicial authorities as to the right of an individual to expatriate himself. However, such right was later established as a part of our statutory law by the Act of Congress of July 27, 1868. The provision concerning this right, and related ones declaring the status of native and naturalized citizens and the protection to be given to them when outside of the United States, are found in the Revised Statutes as follows:[1]

> Sec. 1999. Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.
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> Sec. 2000. All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens.
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> Sec. 2001. Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by

[1] 15 Stat. 223–224; Rev. Stats. Secs. 1999–2001.

or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

Voluntary renunciation of citizenship is facilitated by the Expatriation Act of March 2, 1907, which declares, in Section 2,[2] "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state." Section 3 of the same act provided, "That any American woman who marries a foreigner shall take the nationality of her husband." In Mackenzie *v.* Hare,[3] the Supreme Court of the United States held that marriage with notice of the statute was tantamount to voluntary expatriation.

The "Cable Act" of September 22, 1922,[4] upon the subject of the independent naturalization and citizenship of married women, which repealed the provision just quoted, expressly removed the preëxisting bar of the marital status, and Section 3 recites that, "Nothing herein shall be construed to repeal or amend the provisions of Revised Statutes 1999 or of Section 2 of the Expatriation Act of 1907 with reference to expatriation."

Further legislative expression of the right of expatriation is represented by the provisions of the naturalization conventions between the United States and a score of foreign countries, determining the citizenship status of members of the contracting states under certain conditions. The first, with the North German Union, was as early as February 22, 1868. European party states to these conventions, with the dates they were signed or concluded, comprise, in alphabetical order, Austria-Hungary (1870), Baden (1868), Bavaria (1868), Belgium (1868), Bulgaria (1923), Denmark (1872), Great Britain (1870, 1871), Hesse (1868), the North German Union (1868), Portugal (1908), Sweden and Norway (1869), and Wurttemberg (1868). In the Western Hemisphere are included the Argentine Republic (1906), Bolivia (1906), Brazil (1906, 1908), Chile (1906), Colombia (1906), Costa Rica (1906, 1911), Cuba (1906), Ecuador (1872, 1906), Guatemala (1906), Haiti (1902), Honduras (1906, 1908), Mexico (1868, 1906), Nicaragua (1906, 1908), Panama (1906), Paraguay (1906), Peru (1906, 1907), Salvador (1906, 1908), and Uruguay (1906, 1908).[5]

[2] Act of March 2, 1907; 34 Stat. 1228.

[3] (1915), 239 U. S. 299, 312.

[4] Act of September 22, 1922; 42 Stat. 1021–1022.

[5] See Treaties, Conventions, International Acts, Protocols, and Agreements between

With the exceptions hereafter noted, all of the foregoing conventions became effective. Six of the eighteen party states to the Pan American Naturalization Convention of 1906—Bolivia, Cuba, Mexico, Paraguay, Peru, and Uruguay—apparently failed to ratify it, and Guatemala, which had ratified, denounced it in 1914. The ratification of the United States was deposited with Brazil, February 25, 1908.[6] Ecuador terminated her convention of 1872 in 1892, by notice,[7] and Mexico took similar action in regard to hers of 1868,[8] terminating it in 1882.

It must be noted that the early naturalization conventions with Austria-Hungary and the German states appear to have been terminated by the declarations of war upon Austria-Hungary[9] and Germany,[10] by the United States. But the continued recognition by these former enemy countries of the individual's right to change his nationality is indicated by the treaty stipulations acquiesced in by these states at the conclusion of the World War, the benefits of which are guaranteed both to the United States and to the Allied and Associated Powers. The stipulations are found, as to Austria, in Article 230, of Part 10, Treaty of Saint-Germain-en-Laye, of September 10, 1919.[11] Identical ones bind Hungary, in Article 213, of Part 10, Treaty of Trianon, of June 4, 1920;[12] and Germany, in Article 278, of Part 10, Treaty of Versailles, of June 28, 1919.[13]

The distinguished board authorized by Congress and appointed by the Secretary of State in 1906, consisting of Dr. James Brown Scott, Dr. David Jayne Hill, and Mr. Gaillard Hunt, reported exhaustively upon the subject of Citizenship, Expatriation, and Protection Abroad. In discussing the

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the United States of America and other Powers, 1776–1923, Washington, Government Printing Office; or United States Statutes at Large. As to the convention with Bulgaria, see 43 Stat. 1759.

[6] Treaties, etc., *ibid.*, Vol. 3, p. 2882; 37 Stat. 1653. The Pan American Naturalization Convention, signed August 13, 1906, became effective in the countries ratifying it, three months from the date ratifications were communicated to the Government of Brazil. The President of the United States, by proclamation of January 28, 1913, reported ratifications by the Argentine Republic, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Salvador. It is understood, however, that Mexico, in 1923, disclaimed having ratified the convention.

[7] *Ibid.*, Vol. 1, p. 434.

[8] *In re* Rodriguez (1897), 81 Fed. 337, 353.

[9] Joint Res., December 7, 1917; 40 Stat. 429.

[10] Joint Res., April 6, 1917; 40 Stat. 1.

[11] "Austria undertakes to recognise any new nationality which has been or may be acquired by her nationals under the laws of the Allied and Associated Powers, and in accordance with the decisions of the competent authorities of these Powers pursuant to naturalisation laws or under treaty stipulations, and to regard such persons as having, in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin." Treaties, etc., *ibid.*, Vol. 3, pp. 3149, 3232.

[12] *Ibid.*, Vol. 3, pp. 3539, 3624.

[13] *Ibid.*, Vol. 3, pp. 3329, 3449.

attitude of foreign governments upon expatriation, it said:[14] "In the greatest number of cases, however, the right of voluntary expatriation is admitted, and the relationship is supposed to cease whenever the subject or citizen renounces the old and assumes a new allegiance."

Speaking of expatriation, Hall says that international law must either maintain the principle of the permanence of original national ties, until broken with the consent of the state to which a person belongs who wishes to be naturalized elsewhere, or must recognize that the force of this principle has been destroyed by diversity of opinions and practice, and that each state is free to act as may seem best to it. He adds: "There can be no doubt that the latter view is more in harmony with the facts of practice than the former."[15] It cannot be said, however, that Hall recognizes the right of expatriation as a rule of international law. But the great Westlake is quoted:[16] "The doctrine of perpetual allegiance, expressed by the maxim *nemo potest exuere patriam*—no one can divest himself of his nationality by his own act—once generally prevailed. It is now as generally discarded, and a right of expatriation admitted."

It is of interest to note that the International Law Association, at its Thirty-third Conference at Stockholm, accepted the recommendation of the Committee on Nationality and Naturalisation approving *in toto* the doctrine of voluntary expatriation contained in Section 1999, United States Revised Statutes.[17]

There is no question that the announced doctrine in the legislation of 1868 that expatriation is naturally and inherently the right of *all* people, has been considerably circumscribed in the United States through various restrictions prescribed by the agency which announced the principle—Congress. Section 2169, United States Revised Statutes, since 1875 has limited naturalization to white persons and aliens of African nativity or descent, and Section 14 of the Act of May 6, 1882[18] has forbidden any court to admit Chinese to citizenship. The general naturalization Act of June 29, 1906[19] requires not only five years' residence preceding naturalization, but denies the right of the naturalized person to take up permanent residence abroad within five years thereafter without creating a presumption that he lacked the intention to become a permanent citizen of the United States at the time

[14] Citizenship of the United States, Expatriation, and Protection Abroad; House of Representatives, 59th Cong. 2nd Sess., House Docs. Vol. 72, Serial No. 5175, Doc. No. 326, Washington, Government Printing Office (1907), p. 12.

[15] Hall, William Edward, International Law, Oxford, Clarendon Press, 8th ed. (1924), p. 282.

[16] Westlake, John, International Law, Part I, Peace, 2nd ed., Cambridge, University Press (1910), p. 237.

[17] The International Law Association, Report of Proceedings, 33rd Conference, Stockholm, September 8–13, 1924; London, Sweet & Maxwell, Ltd. (1925), pp. 25–26, 32.

[18] 22 Stat. 58, 61.

[19] 34 Stat. 596, 601.

he applied for naturalization. In the absence of countervailing evidence, the certificate of citizenship may be canceled as fraudulent under the provisions of Section 15. These legal limitations have been upheld by the Supreme Court of the United States. Alien enemies may not be naturalized if there be any objection on the part of the representative of the Bureau of Naturalization.[20]

In addition, Section 3 of the "Cable Act"[21] provides for the automatic cessation of the citizenship of any woman citizen who marries an alien ineligible to citizenship, and Section 5 of the same Act prohibits the naturalization during the continuance of the marital status of a woman whose husband is not eligible to citizenship.[22]

While provisions in international agreements and statutory law which recognize the right of expatriation are not in themselves international law, they are tangible indications of the existence, for a period of more than half a century as far as the United States is concerned, of the admitted attitude of the independent states represented. The Allied and Associated Powers, together with such other countries as are parties to the naturalization conventions already referred to, would appear to comprise a preponderance of the states of the world, in power and influence, if not actually in number.

The situation described, without considering similar agreements among the foreign states and the provisions in effect generally throughout the civilized countries of the world for the ready change of nationality, seems fairly to justify the assertion that the doctrine of voluntary expatriation has been accepted as a part of international law, even though its exercise has been limited to some extent.

2. (b) *Assuming that the right of expatriation does not prevent a country from punishing its former nationals who have obtained naturalization in another country for offenses committed before emigration, does it prevent punishment for the act of emigration itself where such emigration was prohibited by law?*

During the last few decades, world conditions have stimulated greater freedom of emigration, coupled with a growing strictness in the immigration laws of some countries. Unproductive soil, the heavy burden of taxes,

[20] Act of June 29, 1906 (34 Stat. 596), as amended by Act of May 9, 1918 (40 Stat. 542, 545), 11th subdiv., Sec. 4.

[21] Act of September 22, 1922; 42 Stat. 1021, 1022.

[22] *Ibid.* The term "ineligible to citizenship," in the Immigration Act of 1924, possesses a meaning beyond racial disqualification, as it includes an individual debarred from becoming a citizen of the United States under any of the following statutes: (a) Section 2169, Revised Statutes, because not white or of African nativity or descent. (b) Section 14, Act of May 6, 1882 (22 Stat. 58, 61), because a Chinese. (c) Section 1996, 1997, or 1998, Revised Statutes, as amended by Act of August 22, 1912 (37 Stat. 356), because of desertion from, or avoidance of the draft into, the military or naval service. (d) Section 2, Act of May 18, 1917 (40 Stat. 76, 77–78), as amended by Act of July 9, 1918 (40 Stat. 845, 885), because of having withdrawn his declaration of intention in order to avoid military service. (e) Any law amendatory of, supplementary to, or in substitution for, any of the foregoing. Sec. 28, Act of May 26, 1924; 43 Stat. 153, 168.

especially since the World War, unrest due to desire for self-determination, and greater ease of travel have impelled many to leave their native lands in search of more promising places in which to live. In connection with the international movements of people, all the member states of the society of nations are obligated, under international law, to promote and protect, within reasonable limits, intercommunication and intercourse subject to the restrictions imposed by just laws for the regulation of immigration. The observance of the obligation to further intercommunication and intercourse is impliedly agreed to by the state's acceptance of the doctrine of voluntary expatriation.

If it be admitted that the right of expatriation, the right to voluntarily change one's national allegiance, is a part of international law and therefore observed in practice by independent states, it logically follows that emigration, except in time of war, is also a right.

While one may, and sometimes does suffer the loss of nationality of one state without acquiring that of another, thus being left stateless, the usual form in which expatriation occurs is by the acquisition of the nationality of the second state, through naturalization or otherwise, after removal to the latter state. Attorney General Black, in his well known and often quoted opinion upon the subject of expatriation, expressed the idea in forceful language when he advised President Buchanan in the Christian Ernst case:[23]

> The natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose, the privilege of throwing off his natural allegiance and substituting another allegiance in its place—the general right, in one word, of expatriation, is incontestable. . . . *Expatriation* includes not only *emigration* out of one's native country, but *naturalization* in the country adopted as a future residence.

Should emigration be prohibited, it would be impossible in most instances for the national to effectuate expatriation. For a state to concede the right of expatriation while denying the means necessary to accomplish that right—emigration—would be inconsistent and contradictory, for it would be a mere form without substance. Such practice would be lacking in that good faith upon which the entire structure of international law is grounded.

The conclusion is impelled, therefore, that a national charged only with having emigrated to another country prior to naturalization there, would not, in the eyes of international law have committed an offense against the state of his former nationality which would be punishable should he return to it.

It may be added that the naturalization convention with each of the following countries, heretofore referred to, contains a specific provision stipulating that the act of emigration itself should not be punishable: Bavaria (1868), Brazil (1908), Bulgaria (1923), Costa Rica (1911), Honduras

[23] 9 Opin. Attys. Genl. (1859), 356, 357–359.

(1908), Nicaragua (1908), Peru (1907), Portugal (1908), Salvador (1908), Sweden and Norway (1869), and Uruguay (1908).

There is probably annexed to the right of emigration, however, the qualification that under extraordinary conditions, such as those created by war, the state is justified, for its own safety and perpetuity, in requiring its nationals to remain within its jurisdiction and subject to its service.

2. (c) (1) *Should a person who has been naturalized during minority through the naturalization of a parent be allowed, upon attaining majority, to renounce such naturalization and,* (2) *if so, under what conditions?*

(1) The national status of a child who acquires citizenship during minority through the naturalization of the parent, is impressed upon the child because of its presumed legal incapacity to act for itself in a matter of such grave importance. Then, too, it is desirable for the sake of family unity that there be also unity of nationality, that the parent may better protect the minor child's rights and interests. But these reasons cease when the child becomes *sui juris*, and to require it, in time of peace at least, to retain the national status imposed upon it by the parent, particularly if against the child's will, would be illogical, violative of the spirit of the doctrine of voluntary expatriation, and opposed to the real interests both of the citizen and of the state whose citizenship such person bears. Forced allegiance is unstable and may result disastrously at the very time when the state most needs the loyal adherence of the citizen.

(2) If the child, after arriving at majority, desires to renounce the citizenship virtually forced upon it by law through the parent, and be residing in the country of the parent's citizenship when it reaches the age of twenty-one years, it would seem to be desirable to permit it, within a prescribed period, to appear in person before an appropriate tribunal or officer and make a formal oath of renunciation of citizenship. If residing outside of such country, the oath might best be taken before a diplomatic or consular officer of the country in question. It is suggested that the oath should be taken before arriving at the age of twenty-two years, as a year's time in which to act upon such election would probably be ample in most cases, and it is desirable in the interests of both the individual and the state that the decision be made within a definite and reasonable time.

2. (d) (1) *Should protracted residence by a naturalized citizen in his country of origin or in a third country cause the loss of the nationality acquired through naturalization or raise a presumption thereof?*

It is generally recognized, at least nationally, that the citizen's allegiance to his state and the state's protection of its citizen abroad are correlative duties. This duty of the state, however, is subject to qualification, based upon the circumstances attending the absence.

One who uses his nationality as a cloak to assure himself of its benefits while evading its duties, thereby escaping also the obligations of citizenship of the foreign country in which he abides, is not deserving of protection by

either country.[24] The situation is well presented by the Department of State:[25]

> But if the citizen, on the one side, has rights which he may claim at the hands of the Government, on the other side there are imperative duties which he should perform toward that Government. If, on the one hand, the Government assumes the duty of protecting his rights and his privileges, on the other hand the citizen is supposed to be ever ready to place his fortune and even his life at its service, should the public necessities demand such a sacrifice. If, instead of doing this, he permanently withdraws his person from the national jurisdiction, if he places his property where it can not be made to contribute to the national necessities; if his children are born and reared upon a foreign soil, with no purpose of returning to submit to the jurisdiction of the United States, then, in accordance with the principles laid down by Chief Justice Marshall,[26] and recognized in the Fourteenth Amendment, and in the act of 1868, he has so far expatriated himself as to relieve this Government from the obligation of interference for his protection.

The forfeiture of nationality through foreign residence alone, whether in the country of origin or in a third country, without regard to circumstances, would be unwarranted, and, in many cases, would undoubtedly result in injustice and great hardship. However, while the worthy citizen abroad should be protected, the ever present problem of the government is to accomplish this while relieving itself of responsibility for the undeserving one.

Representatives of American commerce and industry, and missionaries, to mention but two classes which include naturalized citizens, are frequently required by the nature of their pursuits to remain abroad over extended periods. The severe illness of close relatives abroad is a condition which naturally and properly presents an appeal which cannot and should not, in proper cases, be ignored. The lingering illness of a parent, for instance, might justify the presence of one of the family for many years. Similar instances might be multiplied.

But it is believed that foreign residence under certain other circumstances should result in the loss of nationality *ipso facto*. If the absence shows bad faith in the procurement of naturalization, there should be provision for its revocation *ab initio* (such as Section 15, Naturalization Act of June 29, 1906, *supra*), while if there has been since the naturalization a cessation of real allegiance as indicated by conduct or profession, a procedure should be made available for the termination of citizenship as of a definite date.

A consideration of the many factors involved leads to the belief that the result which is desired should not be sought through raising a rebuttable presumption.

[24] See Citizenship of the United States, Expatriation, and Protection Abroad, *ibid.*, p. 26.

[25] Mr. Fish, Secy. of State, to Mr. Washburne, Minister to France, June 28, 1873, For. Rel. 1873, I, 256, 259; Moore, Int. Law Digest, Vol. 3, pp. 762, 763.

[26] *The Charming Betsy* (1804), 2 Cranch (6 U. S.), 64, 120.

2. (d) (2) *In this relation, is the provision of the second paragraph of Section 2 of the Citizenship Act of March 2, 1907, satisfactory, so that it may be recommended for general adoption?*

If the satisfactory nature of a statute is dependent upon the clarity and completeness of its language, and the certainty and uniformity of its application, then the provision of law described is very unsatisfactory as will appear, it is believed, from the comment which follows.

The provision of the Act of 1907 referred to reads:[27]

> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe.

It will be observed, from a careful reading of the foregoing, that a naturalized citizen who has resided for two years in the foreign state from which he came or for five years in any other foreign state does not, under the terms of the Act, actually cease to be a citizen by virtue of such residence. A presumption arises, however, that citizenship has ceased, though the person in question is given the privilege of overcoming it, "on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe."

The rules referred to require the naturalized persons under the presumption to furnish proofs and affidavits to bring themselves under one or more of the rules. They are quoted below:[28]

> (a) That they are residing abroad solely or principally as representatives of American trade and commerce, and that they intend eventually to return to the United States permanently to reside.
>
> (b) That their residence abroad is in good faith for reasons of health or education in special subjects, and that they intend eventually to return to the United States permanently to reside.
>
> (c) That some unforeseen and controlling exigency beyond their power to foresee has prevented their carrying out a bona fide intention to return to the United States within the time limited by law, and that it is their intention to return and reside permanently in the United States immediately upon the removal of the preventing cause.
>
> (d) That they are residing abroad principally for the purpose of representing a recognized American educational, scientific, philanthropic, or religious organization, and that they intend eventually to return to the United States permanently to reside.

[27] Sec. 2, Act of March 2, 1907; 34 Stat. 1228.

[28] Rules prescribed by the Department of State, in effect April 21, 1926, whereunder the presumption of expatriation may be overcome.

(e) That they reside in a country other than that from which they came and are principally engaged in some legitimate professional or scientific occupation, not inconsistent with American interests and for which occupation they were trained in American institutions; that they maintain effective ties with the United States, and that they intend eventually to return to the United States permanently to reside.

(f) In the cases of naturalized American citizens residing in Canada, Mexico, the West Indies, Central America, or Panama, that they are employed by a legitimate corporation or company which is principally engaged in any legitimate concern, which is effectively owned and controlled by a citizen or citizens of the United States and materially promotes the interests of this country, and that they intend eventually to return to the United States permanently to reside.

(g) In the cases of married women who acquired American citizenship through marriage or the naturalization of their husbands before September 22, 1922, and whose husbands are still American citizens and are residing permanently in the United States, that they themselves have made their plans to come immediately to the United States to reside permanently and are applying for passports for that purpose only.

The proofs and affidavits required to overcome the presumption must set forth the specific facts and circumstances which bring the persons concerned under one or more of the above rules, and mere assertions, even under oath, that any of the enumerated reasons exist will not be accepted as sufficient.

An American woman who was married to an alien on or after September 22, 1922, and has become subject to the presumption of expatriation under the terms of Section 3 of the Act of September 22, 1922, can overcome such presumption only by showing that the principal cause of her foreign residence brings her within the scope of one of the rules prescribed above. She can not overcome the presumption merely by showing that her husband is residing abroad for a reason mentioned in one of the rules.

The above rules, with the exception of Rule (f), are applicable to all foreign countries.

Because the presumption is disputable, and not conclusive, and no period is prescribed by the statute during which the presumption is required to be rebutted, citizenship never terminates, it would seem, but merely lies dormant, awaiting the awakening touch of acceptable evidence before the diplomatic or consular officer.

As there is no requirement in the statute that the naturalized citizen *himself* present the evidence to overcome the presumption, it might be argued that anyone else might do so. Should the former die before the presumption had been overcome, others might be in a position to show that during his life he had brought himself within the rules of the Department. The question could arise where rights dependent upon the continuance of citizenship were in abeyance at the time of death.

Had the proviso granting the privilege of overcoming the presumption been omitted, the presumption would probably have been irrebuttable, and, as a rule of substantive law, have effectually terminated citizenship without

any remedy being left to the person concerned. In such form it might have had the virtue of greater definiteness, which is of much importance to the governments involved in determining national status.

The law provides for the presentation of the evidence in cases under the Act, only to a diplomatic or consular officer, who is normally located outside of the United States, and no provision was apparently made for the naturalized person against whom the presumption arises while abroad, but who returns to this country without having furnished the required evidence. What is such a person's national status? Is his citizenship still in a state of suspended animation? If so, how and before whom may he have his status authoritatively and finally determined?

The brief résumé of the circumstances accompanying the adoption of the statute and its construction by the courts and administrative officers which follows, indicates the confusion and uncertainty which it has caused and the desirability, if not urgent necessity, of legislative clarification.

In favorably reporting upon the then proposed legislation,[29] the House Committee on Foreign Affairs stated that it followed in its general lines the recommendations of the Department of State. It mentioned the subject matter under discussion as, "Perhaps the most important provision of the bill," which the State Department desired in order to guard against international complications in which this country had often been involved. The report scathingly denounced the naturalized foreigner who had sought naturalization for commercial or dishonest purposes, and who resided abroad claiming the protection of the flag while avoiding any responsibilities of citizenship.

The discussion upon the bill made it clear that it was only intended that protection should be withdrawn from the naturalized citizen abroad when he had failed to overcome the presumption, not that citizenship itself should be lost, or that other rights depending upon citizenship should be affected.[30] As Mr. Perkins, who submitted the report, said:

> Any legal rights, any rights of children, any rights of property, of course, still remain to be disposed of by the courts; . . .[31]
>
> No presumption is conclusive on a court. It is a mere presumption, but the presumption would protect the State Department. That is the object of the bill and the result of the bill and the only result of it.[32]

Mr. Bonynge severely criticized the provision on the ground that a solemn judgment of a court evidencing naturalization should not, in effect, be set aside upon a mere presumption. He believed that there should be some proceeding instituted in a court to set aside the naturalization in order

[29] House of Representatives, 59th Cong. 2d Sess., House Reports, Vol. 1, Serial No. 5064, Misc. Report No. 6431, Expatriation of American Citizens, January 18, 1907, p. 2.

[30] Cong. Rec., 59th Cong. 2d sess., Vol. 41, pt. 2, Jany. 21, 1907, pp. 1464–1466.

[31] *Ibid.*, p. 1464.

[32] *Ibid.*, p. 1466.

that the naturalized person might be given the opportunity to be heard, as will be seen from his remarks at page 1465. This same thought is expressed by Mr. Flournoy in his article in the *Yale Law Journal* on the general subject, wherein he suggested that the statute be amended to provide for the termination of citizenship. Referring to the vital importance of the status of citizenship, he added: [33]

> There is no doubt whatsoever that hundreds of our naturalized citizens residing abroad deserve to have their citizenship terminated, but such a serious matter as final loss of citizenship should not be made to depend upon the *ex parte* decision of a clerk in a Government office.

An opinion of much importance, even though not accepted by some Federal courts, was handed down by Attorney General Wickersham in 1910, in the case of Jebran Gossin, a native of Syria, who was naturalized in 1905.[34] He returned to Syria about 1907, where he married a Syrian woman. After more than two years' residence there, he brought his wife to this country. He was admitted but she was held by the immigration authorities because of trachoma. If an alien, she was subject to exclusion under the immigration laws. The question of the wife's citizenship was said to depend upon whether the husband had ceased to be a citizen by virtue of the presumption in the Act of March 2, 1907. The Attorney General said that the operation of the act was limited to naturalized citizens "while residing in foreign countries," [35] and that its purpose was,[36]

> simply to relieve the Government of the obligation to protect such citizens residing abroad after the limit of two or five years, as the case may be, when their residence there is not shown to be of such a character as to warrant the presumption that they intend to return and reside in the United States and thus bear the burdens as well as enjoy the rights and privileges incident to citizenship . . . . Obviously, therefore, the essential thing under the act is the intention to return to and reside in the United States. The highest proof of such an intention is the actual return and residence of such a person, amounting as it does to a demonstration.

He concludes: [37] "When a citizen returns to the United States, the necessity for such protection no longer exists, and it is fair to assume that with the cessation of the necessity the presumption created by the act also ceases."

Probably the most extreme case reported in which the presumption was attempted to be invoked is *In re* Wildberger.[38] A native and citizen

[33] Flournoy, Richard W., Jr., "Naturalization and Expatriation," in Yale Law Journal, Vol. 31, No. 8, June, 1922, pp. 865, 866.

[34] 28 Opin. Attys. Genl. (1910), p. 504.

[35] *Ibid.*, p. 507.

[36] *Ibid.*, pp. 507–508.

[37] *Ibid.*, p. 510.

[38] (1914), 214 Fed. 508; U. S. Dist. Court, East. Dist. of Pa.

of Switzerland was admittedly eligible to naturalization by reason of honorable service in the United States Army, if the proviso in the Act of 1907 did not bar him. After such service and while still an alien, he returned to Switzerland for more than two years and held and filled an elective office. He then came back to the United States and made his application for naturalization. Judge Dickinson held that the portion of the Act in question was highly penal, and not to be extended to include persons not within its purview. It was never intended to embrace persons not citizens, he said, as it referred specifically to naturalized citizens.

In United States *ex rel.* Anderson *v.* Howe,[39] Anderson, a former Swede, was naturalized in 1905. He returned to Sweden in 1906 and remained until 1915, when on his arrival at a port of this country he was ordered deported as an insane alien. Judge Hough referred to Attorney General Wickersham's opinion but refused to accept the latter's views, and held that Anderson "is an alien," because of failure to overcome the presumption under the Act of 1907.

The court, in Stein *et al. v.* Fleischmann Co. *et al.*,[40] held that the failure of Stein, a former Austrian residing abroad, to satisfy the diplomatic or consular officer that he had not reacquired Austrian citizenship under Article 4 of our naturalization convention of 1870 with Austria-Hungary,[41] would not affect his American citizenship status itself, acquired through naturalization in 1891. Though he had left the United States in 1909, and had resided one year in Paris, over five years in Germany, and over a year in Vienna where he was in business, and intended definitely and permanently to live abroad and conduct his business there, the court held him to be a citizen of the United States. As to the determination by diplomatic and consular officers, Judge Learned Hand said:[42] "I can hardly think that Congress meant their decision to be conclusive upon the putative citizen for all times and at all places."

Judge Trieber, in 1918, denied a number of applications for citizenship of alien soldiers who did not intend to reside permanently in the United States. The court said that the intention of Congress that there should be no naturalization for temporary purposes may be deduced from the Act of 1907,[43] "which provides for a forfeiture of naturalization, if the naturalized citizen should have resided for two years in the foreign state from which he came."

Banning *v.* Penrose[44] was based on a petition for a writ of *habeas corpus*

[39] (1916), 231 Fed. 546; U. S. Dist. Court, So. Dist. of N. Y.

[40] (1916) 237 Fed. 679; U. S. Dist. Court, So. Dist. N. Y.

[41] Treaties, etc., *ibid.*, Vol. 1, p. 46; 17 Stat. 833, 836.

[42] Stein *et al. v.* Fleischmann Co. *et al.*, *ibid.*, p. 682.

[43] *In re* Naturalization of Aliens in Service of Army or Navy of United States (1918), 250 Fed. 316; U. S. Dist. Court, East. Dist. Mo., East. Div.

[44] (1919), 255 Fed. 159; U. S. Dist. Court, No. Dist. Ga., No. Div.

to free Banning, an alleged alien enemy. He had been naturalized in 1903, and it was charged that "he afterwards expatriated himself by his conduct in going to Germany and residing there some time." It is not shown when he returned to Germany or came back to the United States. Judge Newman held that "the evidence that he intended to take up a permanent residence in Germany should be reasonably clear," and as it indicated that "his intention was to retain his home in the country of his adoption," he was declared to be still a citizen.

Sinjen *v.* Miller, Alien Property Custodian, *et al.*,[45] was an attempt by Sinjen to recover property seized during the World War while Sinjen, a native of Germany, was residing there. After naturalization in 1893, he returned to Germany in 1901 for what was expected to be a brief visit. After about twenty years' absence, broken by a short trip to the United States about 1908 or 1909, having failed to satisfy the diplomatic or consular officer that the presumption had not run against him, he finally managed to get back to the United States. The court rejected the government's contention that by reason of the failure to overcome the presumption, Sinjen's citizenship status should not be regarded as an open question before the court,[46] and held that the State Department's decision was not conclusive. Judge Woodrough also refused to agree to Attorney General Wickersham's opinion that mere return to the United States rebutted the presumption of noncitizenship.[47]

On appeal, this decision was affirmed[48] by Judges Lewis, Trieber, and Booth, who were "strongly impressed with the reasoning and with the conclusion" of the Attorney General, though finding it unnecessary to pass upon the proper construction of the Act of 1907. This court also decided that the statutory presumption was not one of renunciation but of abandonment of citizenship, and the State Department's finding was for that Department's convenience and not binding on the courts.

In Nurge *v.* Miller, Alien Property Custodian, *et al.*,[49] plaintiff's citizenship was in question. German by origin, he had come to the United States in 1870, was naturalized in 1888, and returned to Germany in 1909, intending to remain less than a year. He did not return to the United States until 1920. Judge Campbell agreed with the contention that the mere return to the United States was insufficient to show that American citizenship had not been forsaken, stating that the burden was upon plaintiff to show his intention of remaining a citizen during all his absence and at the time of trial. Judgment was for plaintiff.

[45] (1922), 281 Fed. 889; U. S. Dist. Court, Neb., Omaha Div.
[46] *Ibid.*, p. 890.
[47] *Ibid.*, p. 891.
[48] Miller, Alien Property Custodian, *et al.* v. Sinjen (1923), 289 Fed. 388; U. S. Cir. Court Appeals, 8th Circuit.
[49] (1923), 286 Fed. 982; U. S. Dist. Court, East. Dist. N. Y.

Gay *v.* United States[50] shows strikingly the injustice which may arise through the action of an Executive Department under the presumptive clause of the Act of 1907. The plaintiff, a native of Switzerland, was naturalized in the United States in 1897. In 1908 he was retired as a warrant officer of the United States Navy, on account of disability, after over twenty years of honorable service. In 1909, the Navy Department granted him permission to leave the limits of the United States and he took up residence in Switzerland, although keeping in touch with the department and subject to call to duty. In 1912 he made an affidavit before an American vice consul to overcome the presumption of expatriation, after two years' residence in Switzerland.

In 1916, within a few months after receiving instructions from the Navy Department, and based on the opinion of a subordinate officer, his pay was stopped. The Navy Department gave as the reason for this drastic action, which reason was not, however, communicated to Gay, that he should officially be regarded as having expatriated himself under the Act of 1907, and therefore had abandoned his office, which the law and regulations prescribed should be occupied only by a citizen of the United States. The effect was to remove him from office and deprive him of his rights and emoluments, without a hearing. Approving Mr. Wickersham's holding that the essential thing was the intent to return and reside in the United States, the court held that Gay was still a citizen of the United States, gave judgment for over $10,000 pay withheld, and declared that,[51] "it was not in the province of the Navy Department, or of any of its officers, to pass upon the rights of the plaintiff and to declare that he had expatriated himself, and and thereby to dismiss him from the Navy."

On appeal to the Supreme Court of the United States,[52] the judgment was affirmed. The Supreme Court stated that the contention of the United States that Gay had presumptively lost his citizenship by having resided for over two years in Switzerland, put out of view all of the other facts of the case—of Gay's rights as an officer of the Navy, from which service he could not be dismissed under the law and regulations of the Navy, in time of peace, except in pursuance of the sentence of a general court martial. By that law, and not the Act of 1907, his case was to be judged, said the court. The presumption under the latter Act was easy to overcome, added the court, and was a matter of option and intention. Mr. Justice McKenna delivered the opinion.

It will appear from the foregoing decisions[53] that there is a seemingly hopeless conflict in the application of the clause in the Act of March 2, 1907, providing for the presumptive cessation of citizenship. The citizenship

[50] (1922), 57 Court of Claims, p. 424.

[51] *Ibid.*, p. 430.

[52] United States *v.* Gay (1924), 264 U. S. 353.

[53] See detailed discussion of opinions by Mr. Flournoy, *loc. cit.*, pp. 858–866.

status of persons who are still laboring under the presumption, so far as the State Department is concerned, is being raised constantly before the other Executive Departments. While the Attorney General has ruled on the matter, some of the Federal courts have not been in agreement with him nor with each other, either upon this point or other related ones. As there are over two thousand Federal and State courts having jurisdiction to naturalize aliens, before which this Act may be drawn in question at any time, the likelihood of even greater divergency of views is apparent. Other courts also may have to decide cases where questions of citizenship are in issue.

The inconvenience, if not serious embarrassment and hardship, is readily conceived in cases where the presumption has been invoked against some of the members of a family, while other members of the same family are given full recognition as citizens of the United States. It has been the cause of dividing families under distressing conditions. Naturalized Americans who fought honorably overseas in the American forces during the World War and who visited their old homes after discharge, have also been caught in the net. If these people are looked upon as aliens and required to secure immigration visas to come to this country, they may have to wait many years in countries where the quotas are exhausted and the demand great. If they finally do get back as aliens, will the courts renaturalize them? Technically, at least, they are still citizens, and the courts quite generally hold that the naturalization laws apply to aliens only. Should war break out and find such persons still under the disability, and the belligerent states involved be those directly concerned in the national status of the persons in question, would the unfortunate victims of the presumption "be shot in the chest by one of them and in the back by the other," as humorously remarked by Mr. Bewes,[54] in discussing the dilemma during a state of war of persons with double nationality?

On the whole, it is believed that the presumptive clause of the Act of March 2, 1907, has proved too unsatisfactory in practice to warrant recommending it to other countries for adoption.

2. (d) (3) *If not, in what respects should it be changed?*

Because of the great responsibility the government assumes for its citizens who are absent from their national home, which responsibility falls ultimately upon the individual citizens who remain at home, there exists a right to demand of the person proceeding abroad every reasonable guarantee against improper use of his national status. If such citizen has the proper concept of the value of his citizenship and of the government's protection of him, as well as of the obligation to his fellow citizens at home, he will be anxious to submit to reasonable regulation.

The following rough outline of a proposed statutory procedure is suggested, solely for the purpose of discussion:

[54] Bewes, Wyndham A., Secretary, Committee on Nationality and Naturalisation, in Report of the International Law Association, *ibid.*, p. 23.

(a) Require registration with the appropriate diplomatic or consular officer by naturalized citizens abroad (other than governmental representatives and their immediate families), once within every two years in the country of origin, and once in every five years in other countries (or such other periods as may be deemed advisable), upon satisfactory evidence of citizenship.

As a part of the registration, require the registrant to renew his oath of allegiance to the United States, and to make oath as to the reasons for his absence and his intention as to returning to the United States for permanent residence.

(b) Furnish such citizen upon registration with an appropriate registration certificate, containing his signature, photograph, finger prints, and such other evidence of identity as will make it difficult to falsify, the same certificate to be used in subsequent registrations should the person remain abroad beyond the initial period.

(c) Provide that a naturalized citizen abroad who fails to register within the time and in the manner required, shall, at the expiration of the two year or five year period from the date of departure from the United States, be held to have voluntarily expatriated himself as of the date of the expiration of the period prescribed, and shall be eligible to repatriation only in compliance with the general provisions of the naturalization laws, after admission to the United States in compliance with the immigration laws.

(d) Upon the return to the United States of the absentee, require the presentation at the port of entry of his certificate of registration as evidence that he has not expatriated himself by reason of prolonged residence abroad, in the absence of which certificate the burden shall be upon him to prove that he has not expatriated himself.

(e) The original record of registration should be maintained where made, while duplicates should be transmitted to the Department of State and the Department of Labor, for use in the latter department by the Bureaus of Immigration and of Naturalization.

Objections to such a plan will be readily apparent, but it is believed that it has the virtue of definiteness, and does not leave the individual's status in doubt.

Even though the citizen should register within the prescribed period, the State Department in any event would probably continue to use its discretion as to whether it would protect him. Professor Edwin M. Borchard, in his exhaustive treatise, *The Diplomatic Protection of Citizens Abroad* (New York, The Banks Law Pub. Co., 1915, pp. 713–791), has classified acts of the citizen which may result in the refusal or limitation of the protection ordinarily extended by the government to the citizen abroad. They may be thus briefly stated:

(a) Inequitable conduct generally, including immorality, disloyalty to his own government, or unneutral acts.

(b) Denial or concealment of citizenship.

(c) Deception or fraud in the presentation or merits of the claim.

(d) Evasion of national duties, and particularly military service.

(e) Breach by the citizen abroad of the local law, international law, or his national law.

3. (a) (1) *Should the nationality of a married woman as a rule follow that of her husband?*

In the writer's opinion, the wife's citizenship should not depend upon that of the husband, but she should be placed in a position of equality with the husband in this respect.

The well recognized rule by which the nationality of the wife follows that of the husband has been gradually giving way before a changed opinion and strong demand. It is a commonplace that the woman was long regarded as man's inferior, particularly as concerned her legal and political status. Unity of the family, the common law theory of the oneness of husband and wife, with the husband recognized as "the one," and the headship of the husband and father, largely accounted for the placing of the wife's status beyond her control and automatically merged in that of the husband. However, reform legislation, particularly during the past seventy-five years, and the greatly changed sentiment in favor of the equality of the sexes, have stimulated a modification of the doctrine of nationality for women.

M. Rundstein, in reporting upon the subject of nationality for the subcommittee to the League of Nations Committee of Experts for the Progressive Codification of International Law,[55] refers to the very marked tendency at the present time as represented by the most recent laws, to abandon the old principle that marriage *ipso facto* involves loss of nationality for the woman, and to grant married women the right to choose their own nationality, irrespective of the fact of marriage. This, he says, obviously will give rise to conflicts which were formerly unknown. His suggested solution is the adoption of the uniform principle that a woman retains her nationality upon marriage or upon the naturalization of her husband, unless she explicitly declares that she desires to acquire the nationality of her husband.

It is his opinion, however, that although the establishment of a world law on the subject, or the adoption as a basis for internal laws of certain general principles which have been advanced, is very desirable, the introduction of such a program would now be premature as the time for such measures does not appear to have arrived.

In a supplementary note,[56] M. Rundstein analyzes the suggestions of the International Law Association adopted by the Thirty-third Conference at Stockholm in 1924,[57] for the uniform regulation of questions of nationality. He quotes President Hammarskjöld's view in the latter's report to that conference, wherein the president stressed the fact that "under present

[55] League of Nations, Committee of Experts for the Progressive Codification of International Law, *Questionnaire* No. 1, C. 43. M. 18. 1926. V (C. P. D. I. 53), Geneva, February 9, 1926, pp. 8–9.

[56] *Ibid.*, p. 15 (C. P. D. I. 20, Annex).

[57] The International Law Association, Report of Proceedings, *ibid.*, pp. 22–72.

conditions, a reform which would deprive marriage of its automatic effect on the nationality of the wife would have very little chance of being universally accepted." [58]

Consideration of the woman's political and citizenship status in the United States leads to the belief that the present principle of independent status is too strongly grounded to justify the hope that international benefits from uniformity would be looked upon as outweighing national wishes.

The adoption of the Nineteenth Amendment to the Constitution [59] guaranteed women citizens against infringement of the right to vote on account of sex, and in the same year, both the Republican and Democratic national parties included planks in their platforms indorsing the idea of the independent naturalization and citizenship of married women.[60] Then in 1922 the "Cable Act" [61] was passed which, in large measure, conferred an independent status on married women in respect to nationality and citizenship, although it has received some criticism as containing inequalities, and cannot be said to have been entirely satisfactory in operation.

Under the Act of February 10, 1855,[62] any woman married to a citizen of the United States and racially eligible to naturalization, was a citizen, although she might possess no personal qualifications for citizenship.

Prior to the passage of the Act of March 2, 1907,[63] with the provision in Section 3, "That any woman who marries a foreigner shall take the nationality of her husband," the citizenship status of an American woman married to a foreigner was in doubt, even though it had been claimed that the matter above quoted was merely declaratory of the then existing law.[64] While the court, in Pequignot *v.* City of Detroit,[65] had in 1883 held that an American woman who married a foreigner took her husband's nationality, other decisions support the view that the wife either retained her American citizenship, or did not lose it unless she took up residence outside of the United States, or at least that there was doubt as to her status.[66]

As Mr. Justice McKenna stated in Mackenzie *v.* Hare,[67] upholding the constitutionality of the above quoted section,

[58] League of Nations, *Questionnaire* No. 1, etc., *ibid.*, p. 16.

[59] Proclaimed August 26, 1920 (41 Stat. 1823).

[60] House of Representatives, 67th Cong. 2d Sess., Reports. Serial No. 7957, Vol. 3, Report No. 1110, Naturalization and Citizenship of Married Women, June 16, 1922.

[61] Act of September 22, 1922; 42 Stat. 1021.

[62] Section 1994, U. S. Revised Statutes. [63] 34 Stat. 1228.

[64] Cong. Rec., 59th Cong. 2nd Sess., Vol. 41, Pt. 2, House of Representatives, January 21, 1907, p. 1464.

[65] (1883), 16 Fed. 211.

[66] *Cf.* Shanks *v.* Dupont (1830), 28 U. S. (3 Pet.) 242, 246–250; Beck *v.* McGillis (1850), 9 Barb. (N. Y.) 35, 49; Comitis *v.* Parkerson *et al.* (1893), 56 Fed. 556–564; Jennes *v.* Landes (1897), 84 Fed. 73; Ryder *v.* Bateman (1898), 93 Fed. 16, 21; Ruckgaber *v.* Moore (1900), 104 Fed. 947–949; Wallenburg *v.* Mo. Pac. Ry. Co. (1908), 159 Fed. 217–219 (marriage in 1904); *In re* Fitzroy (1925), 4 Fed. (2d) 541–542 (marriage in 1905).

[67] (1915), 239 U. S. 299, 311–312.

> It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences.

Prior to the Act of March 2, 1907, there was no statute to put the American woman on notice.

Particularly because of dissatisfaction with the results which followed the Act of 1907, the Act of 1922 was passed. The principal arguments for its adoption appear to have been as follows: (a) Recognition of the equality of women in civic and political life and in the family. (b) Relief of loyal American-born women whose interests were all in and for the United States, but who were automatically decitizenized and disfranchised upon marriage to aliens. (c) Opportunity for the married alien woman who desired citizenship but whose husband did not, or could not qualify. (d) Desirability that the foreign-born woman be required to demonstrate to a court her educational and other qualifications for citizenship, as well as that she renounce foreign allegiance and accept that of the United States under the appropriate oath of allegiance. (e) Desirability of providing for the presumptive cessation of citizenship of the American woman married to an alien, after residence for two years in the state of her husband's nationality, or five years outside of the United States.[68]

The favorable report[69] of the Committee on Immigration and Naturalization upon the bill stated that the section providing for the retention of citizenship by the American woman on marriage to an alien was "particularly designed to give to the citizenship of the American woman the dignity and individuality which has heretofore been the exclusive attribute of the male citizen." In effect, however, the legislation denies such individuality in one respect by annexing the penalty of automatic loss of citizenship of the American woman upon marriage to an alien ineligible to citizenship.[70] Section 5 contains a somewhat similar disqualification: "That no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status." The first of these two provisions was merely mentioned in the committee report, without comment, and the second not at all.

There was some unfavorable comment on the floor of the House of Representatives because of penalizing the woman for marriage to an alien man ineligible for citizenship without prescribing a like disability for the American man marrying an ineligible alien woman.[71] Objection has

[68] House of Representatives, Report No. 1110, *ibid.;* also Cong. Rec., 67th Cong. 2nd Sess., Vol. 62, Pt. 9, June 20, 1922, pp. 9039–9067.

[69] House of Representatives, Report No. 1110, *ibid.*, p. 3.

[70] "*Provided*, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States." Section 3, Act of September 22, 1922.

[71] Cong. Rec., 67th Cong. 2nd Sess., Vol. 62, Pt. 9, June 20, 1922, pp. 9057, 9062–9064.

been urged against this discrimination with resulting forfeiture of the rights and privileges of citizenship, by persons speaking for representative women's organizations.[72]

It has been claimed that hardship may be inflicted on an American woman married to an alien, where the wife has resided for two years in her husband's foreign state, or for five years outside of the United States, because of the difficulty the wife may find in bringing herself within the State Department's rules independently of her husband. Technical equality would seem to require that any American male, married to an alien wife and residing for two years in her foreign country, or for five years outside of the United States, should be subject to the same presumption of cessation of citizenship.[73]

The Secretary of Labor, in a communication to Senator Hiram W. Johnson,[74] expressed the opinion that the presumption of cessation of citizenship prescribed by Section 2 of the Act of March 2, 1907, should apply to the American wife of an alien, as such residence, without the presumption arising, "would likely cause no end of problems by such women claiming continued protection abroad as citizens of the United States and yet in other respects be involved in and identified with commercial and political affairs of foreign countries of which their husbands are citizens or subjects."

If the suggested change of procedure in question 2 (d) (3) should be adopted, it should apply to the woman citizen as well as the man, under the same circumstances.

As of interest, there are quoted without comment, the provisions relative to married women as they appear in the Preliminary Draft of Convention amended by M. Rundstein after discussion in the League of Nations Committee of Experts for the Progressive Codification of International Law:[75]

> Article 8. A woman who has married a foreigner and who recovers her nationality of origin after the dissolution of her marriage loses through such recovery of the original nationality the nationality which she acquired by marriage.
>
> Article 9. A married woman loses her original nationality in virtue of marriage only if at the moment of marriage she is regarded by the law of the State to which her husband belongs as having acquired the latter's nationality.
>
> Where a change in the husband's nationality occurs during the

[72] Hearings on S. Bill 2969, Naturalization and Citizenship of Married Women, before subcommittee of Committee on Immigration, U. S. Senate, 69th Cong. 1st Sess., March 24, 1926, pp. 8–15. Hearings on H. Bills 4057, 6238, 9825, Immigration and Citizenship of American-born Women Married to Aliens, House Committee on Immigration and Naturalization, 69th Cong. 1st Sess., March 23, 1926, pp. 12, 17–19, 21, 22.

[73] Hearings on S. Bill 2969, *ibid.*, pp. 8–11, 15–18. Hearings on H. Bills 4057, 6238, 9825, *ibid.*, pp. 13–16.

[74] Hearings on S. Bill 2969, *ibid.*, pp. 19, 20.

[75] League of Nations, *Questionnaire* No. 1, etc., *ibid.*, pp. 20–21.

marriage the wife loses her husband's nationality only if the law of the State whose subject her husband has become regards her as having acquired the latter's nationality.

Article 10. A woman who does not acquire through marriage the nationality of her husband and who, at the same time, is regarded by the law of her country of origin as having lost her nationality through marriage, shall nevertheless be entitled to a passport from the State of which her husband is a national on the same footing as her husband.

3. (a) (2) *If so, should she be allowed, by some affirmative act, to retain or obtain a nationality different from that of her husband?*

Should, however, the rule prevail that the nationality of the married woman follow that of her husband, she should in all fairness be given the option of changing a status of such importance arbitrarily imposed upon her. While it is probable that the subjection of the wife's nationality to that of the husband would further uniformity and tend to the avoidance of conflicts as to nationality, the individual's rights involved are of too vital a nature to warrant the imposition of a purely mechanical rule, solely for the sake of governmental administrative convenience. If such an option for the benefit of the individual concerned creates no appreciable burden on the rest of the group in whose interests alone the artificial machinery of government is set up, then by all means it should be permitted.

3. (b) *If the nationality of a married woman should follow that of her husband, in the absence of an election by her of a different nationality, should the nationality of the husband attach to his wife of alien origin immediately upon their marriage, irrespective of residence, or should it attach at the time when she begins to reside in her husband's country?*

Conceding that the nationality of a married woman should follow that of her husband, in the absence of an election of different nationality, the probabilities are that less perplexing problems in regard to conflicts of status would arise if her acquired nationality should become effective only from the time she takes up residence in good faith in the country of her husband. While it would create a hiatus between the date of marriage and the acquisition of nationality in some cases, and the circumstances of residence might be more difficult to establish than the marriage in order to prove the effective date of the changed status, it would overcome the substantial objection of the extraterritorial effect of the laws of the husband's country in that of the wife.

Any attempt of the husband's state to exercise jurisdiction over the wife while she is actually in and under the sovereignty of her state and has never borne her husband's nationality, might be productive of international annoyance, if not of conflict.

Another controlling reason for the delay is the protection to the husband's country represented by the barrier of its immigration laws, under which a wife who is shown to be of an undesirable class or individually objectionable may be excluded. If her nationality should attach *eo instante*,

however, the state whose nationality she had assumed by marriage would be obliged to receive her regardless of her personal character. The United States, on many occasions in the past, has been made the victim of marriages entered into by its male citizens for the sole purpose of violating or evading its laws through the changed national status of the woman.

The CHAIRMAN. Now that we have had this very interesting and thorough discussion of the problems stated in the program, the meeting is thrown open for discussion from the floor. As the time is somewhat limited, I believe it will meet the will of the body if we limit the discussions to five minutes. If there be questions, as there were this morning, interrupting the speaker, which seemed to add to the interest or liveliness of the discussion, I think it might be well not to take that out of the speaker's time, allowing him his full time if he so chooses. From time to time as questions arise in regard to the technical matters discussed and the general principles, we can also call upon our experts who discussed it for us.

The meeting is now thrown open for discussion.

Professor EDWIN M. BORCHARD. Mr. Dickinson asked me if I would be prepared to say a few words on the questions which have been announced. Several of the remarks made by the speakers encourage me to carry out the suggestion.

I do not blame the League of Nations Committee for dropping this subject as incapable of codification, for I believe it is less capable of uniformity today than it has been for many years. If anybody had, say in 1910, suggested this possibility, I think it would have been more seriously entertained than it can be today. One of the main reasons for that lies not only in the war, but in the recrudescence of intolerance which has been the natural consequence of war. That is manifest in our own country by the proposal to register aliens, thus regarding them, so to speak, if not as quasi-criminals, at least outside the pale. It evidences an extraordinary state of mind. That is a very unfortunate tendency, not good for peace, and not good for psychological tolerance. For that reason, among several others I shall mention, I think the uniformity of nationality laws is now less possible than it has been for a very long time.

In addition to the reason which Mr. Flournoy mentioned, the necessity under which most European countries believe they labor, to maintain a hold upon their citizens for military service, will alone persuade them not to abandon their claims. A good many of them are fairly modest in insisting only on the *jus sanguinis*. Quite a lot of others try to get the citizen both ways, and also adopt the *jus soli*. We do ourselves, as a matter of fact.

As Mr. Flournoy mentioned, we could not possibly adopt the *jus sanguinis* as the exclusive rule, for it would mean a change of our Constitution. I think, however, with Mr. Flournoy, that it is possible to solve questions of dual nationality, not at birth, for that, under present conditions,

I believe impossible, but on arriving at the age of majority. I do not see the necessity for dual nationality then, except for this desire to hold on to the male citizen for military service. I do not see why the citizen cannot be left with a single nationality after he has reached the age of majority. We tried to incorporate that rule into some of our treaties. In a proposed clause of the naturalization treaty with Costa Rica of 1911, the conclusive nationality after reaching the age of majority was to be automatically determined by the place of domicile at the time of reaching majority. This seems to me a desirable rule.

On the question "Has the right of expatriation become a part of international law?" Mr. Hazard thought, yes. I regret to believe, no. I cannot conceive of a rule of international law which is denied by nearly all the major Powers. Nearly all the major Powers of Europe deny the privilege of the individual, on his own desire alone, to expatriate himself without consulting the national authorities.

Again, due to the desire to claim these people for military service, I am somewhat inclined to doubt whether we ourselves adhere to the rule of voluntary expatriation, for we have qualified it most importantly by prohibiting the privilege in time of war. This indicates that we are not really disposed to permit expatriation unqualifiedly. It did not make so very much difference prior to the war what nationality you had, so far as concerns the enjoyment of civil rights. I find it now to be the most important asset, or liability, that the individual may possess, and I see no possibility of greater freedom of expatriation at the present time. The United States has gone very far, and I think has made useful contributions to the liberal tendency.

On the important question of the effect of this very doubtful and ambiguous provision of Section 2 of the Act of 1907, as to what shall be the effect of residence abroad upon the naturalized citizen, and whether his presence there for more than two years raises the presumption of expatriation, it is obvious that that must be ambiguous, because Mr. Wickersham and the Circuit Court of Appeals in New York came to opposite conclusions. I have always felt personally that Mr. Wickersham was right, and I think the Department of State acted on that belief long after the United States District Court handed down its decision in Anderson against Howe, 231 Federal.

My reason for preferring the Wickersham construction is because the Act was framed to aid the Department in determining when it should and when it should not protect citizens abroad. Theretofore, that had depended upon the intent of the individual. Intent is one of the most difficult things in the world to find out, so the Department wanted a guiding rule for aiding it in protecting citizens abroad. It was meant particularly for people abroad. When, therefore, they do come back to the United States, I think it is proper to presume that the presumption of expatriation has been overcome, for when they come back to our shores they indicate that they desire

not to remain abroad. I do believe, however, that it is necessary to amend the Act so as to make it clear.

We have had in this country a belief, different from that of some foreign countries, that it was not a good thing for the American citizen to be away. If he was an American citizen, he belonged here. That is a direct result of the Civil War, when we had so many Americans abroad. There was a call for them to come home. Many of them did not come; hence a prejudice developed in the State Department and in our whole government against the American citizen who was abroad. It really was not until 1910 that the native American citizen escaped the danger of at least losing all the advantages of citizenship by too long a stay abroad. The growth of "economic imperialism," however, the necessity of having representatives abroad, caused a change, and I think Mr. Flournoy was largely responsible for effecting that change embodied in the regulation of July, 1922.

On the question of married women, I am afraid I also differ with Mr. Hazard. I think the nationality of the husband and wife should be the same if possible, and I think much could be done to bring this about, without impairing the woman's freedom. The Cable Act, I think, would have created much less confusion than it has if it had been left in such form, that the nationality of the wife shall follow that of the husband, provided she does not, by some affirmative act, indicate her desire to the contrary. That would, I think, have preserved all the liberty that most of the women would like.

The present law works in a most extraordinary way. In Mackenzie *versus* Hare, a lady who had never left San Francisco found that she had become expatriated by her marriage to Mr. Mackenzie, a Canadian subject. Mr. Justice McKenna said she did not have to marry him. It was a voluntary act on her part. Mackenzie, becoming now a naturalized citizen of the United States, does not make his wife a naturalized citizen. She, though a native-born American, still is an alien. He can get a passport from the Department of State, but she cannot.

Those difficulties, I think, ought, so far as possible, to be avoided. I think, if the Cable Act could be amended, so that instead of providing that she does not acquire his citizenship, it read that she does acquire his citizenship, provided she does not claim the privilege of reserving her own, then all the purposes of the Act would be satisfied and much less confusion created.

Professor HUDSON. Why does Mr. Borchard add "provided she does not claim the privilege of reserving her own?" What is there objectionable about her having both?

Professor BORCHARD. You mean becoming a dual national?

Professor HUDSON. Yes.

Professor BORCHARD. I think, perhaps, as a general principle, it is desirable to avoid dual nationality. It adds confusion to the law. I do not believe it is possible to eliminate it, but I think a good deal can be done

in the field of dual nationality to minimize the confusion, especially in the case of nationality acquired after birth. I think this would be one of the ways of doing it.

Professor HUDSON. What would be the practical inconvenience of such confusion? I do not see such confusion arising to any great extent, and I do not know what its practical inconveniences are for a woman. It is all right for the man, but why in the case of the woman?

Professor BORCHARD. In the matter of our treaties now with foreign countries, by which the privilege of inheriting real estate is so largely dependent upon nationality, I think it is desirable to make certain of single nationality so far as possible. I am not prepared to say that you have to abolish dual nationality in this matter. It is my general feeling that single nationality is desirable. In time of war, single nationality is also usually preferable.

Mr. KUHN. It seems to me, Mr. Chairman, and Mr. Borchard, that there is another more vital objection to dual nationality. Nationality carries with it allegiance, and allegiance to the government does not consist merely of carrying arms. We are speaking in these days of conscripting property and services. In the last war I think even the most advanced misogynist would object to the principle that the women did not do their full share in carrying out their allegiance to the government. If you have a dual nationality, there will be at least confusion. I will say no more than that. The governments of the world are very jealous with regard to the obligations of their citizens, particularly in time of war, and I think it is of the utmost importance, quite apart from the ownership of property in time of war or peace, that so far as possible, there should be single nationality.

Professor HUDSON. Could Mr. Kuhn put a practical case where that question has to be answered?

Mr. WALTER S. PENFIELD. Here is a gentleman who has a practical case, and I would like to have him present the question to Professor Hudson, in view of Professor Hudson's position on dual nationality. Will you answer this gentleman's practical question?

Mr. BERTRAM GALBRAITH. The practical case is this. A woman is of mixed Spanish and French parentage, domiciled in Nice, France, with her widowed mother. There she meets and marries an American Army officer in 1920, and comes to the United States and lives with him. In 1922 the Cable Act is passed, which says that her marriage does not constitute citizenship, and that she must take out naturalization papers. She, believing it is not retroactive, does not do so, but divorces her husband in 1923. Is she Spanish, French, or American, for passport purposes now?

Professor HUDSON. Who was her father?

Mr. GALBRAITH. A Spanish subject.

Professor BORCHARD. You say she married an American citizen in 1920?

Mr. GALBRAITH. In 1920, yes.

Professor BORCHARD. She became an American citizen, then, by marriage, did she not? I cannot see any problem there.

Mr. GALBRAITH. That is one point cleared up, then.

Professor HUDSON. Nobody has ever contended that the Cable Act was retroactive.

Professor BORCHARD. No. If you had said she married in 1923, then we would have a problem.

Mr. GALBRAITH. Does the divorce constitute a problem?

Professor HUDSON. Certainly not.

Professor BORCHARD. They were both American citizens at the time of the divorce, as I see it. By the marriage in 1920, when the Act of 1907 was still in force, she became an American citizen by marriage, just as Mrs. McKenzie did.

The CHAIRMAN. I think that question has been answered. Is there anything further?

Professor BORCHARD. I did not intend to take up so much time. The last point, as to whether the effect of the nationality attaching to the wife should be immediately upon the marriage, or when she comes to the United States, was doubtless inserted because of the difficulty we have had with respect to naturalized citizens here who have left their wives in foreign countries, and then the wives come to the United States. Suppose the wife has trachoma, or some other excludable disease. The question is, shall we exclude her as an alien or admit her as a citizen? The courts differed on that question a good deal, as they did on the effect of Section 2 of the Act of 1907. I think the final decision of the courts was that she was a citizen by marriage and that she arrived here as a citizen of the United States.

In view of my belief that it is desirable to maintain the unity of the family, and even political peace in the family so far as laws can do that, I also believe it desirable that her American nationality shall attach immediately, and I do not believe the United States has lost very much by permitting it. There have not been very many who would have been excluded as aliens.

Professor JESSE S. REEVES. Mr. Hudson, if he has not set forth the charms of double nationality, has at least suggested the lack of disadvantages of it. But what about the other side of it, the woman who has lost all her nationality? Take the case, for instance, of an English woman who marries an American at this time. She does not acquire American nationality and she loses her British nationality.

Professor BORCHARD. Field would have tried to solve that by saying, in such a case of statelessness, that he would have the last nationality assigned to the lady, in view of the fact that some nationality, he felt, must be possessed by everybody.

Professor REEVES. Would you not suggest, as a good change in the Cable Act, the reproduction of the provision that I think is in the code of

Napoleon, that if a woman does not acquire her husband's nationality, she shall retain her own?

Professor GARNER. The provision in the French law is that a French woman who marries an alien does not lose her French nationality until she has acquired the nationality of her husband, so that a French woman who marries an American husband today does not lose her French nationality, whereas a British woman who marries an American husband loses her British nationality, and does not acquire American nationality, and consequently she is stateless.

Mr. KINGSBURY. This third subdivision of the subject this afternoon is one to which I have been obliged to give some special attention lately, and there are a few points I should like to add to the very interesting and logically arranged paper of Mr. Hazard.

Mr. Hazard stated at the beginning of his paper on that subject that at common law the citizenship of the wife necessarily follows that of the husband. That had been my belief. I had taken that for granted, but I had occasion to examine that question somewhat more carefully within the past month or so, and I found that it had been held by the Supreme Court of the United States, in a case in the early part of the nineteenth century, that the mere fact of marriage of an American citizen to an alien did not destroy her American citizenship, and that it continued until she removed to the foreign domicile of her alien husband. I am not at all sure that some rule of that kind, if embodied either in American statutes or an international convention, might not furnish as good a solution as any to this problem. An American woman marrying a foreigner and continuing to reside in the United States would retain her American citizenship, but if she removed to her husband's foreign domicile she would then be at least presumed to have acquired his nationality.

Mr. FLOURNOY. There is such a presumption in the present law after she has been there two years.

Mr. KINGSBURY. Yes; the same presumptions that attach in the case of expatriation of naturalized citizens.

There is a phase of the subject covered in 3 (b) that has really not been touched upon, except very casually, that I think offers one of the important questions which form part of this whole problem, and that is the status of an American woman who lost her nationality by marriage before the Cable Act was passed, and whose marital status has terminated, and who desires to resume her American nationality. Under the law as it existed, through the rulings of the State Department before the Act of 1907, she could resume her American nationality by returning to the United States. Under the law of 1907 she could resume her American nationality either by registering with a consul or diplomatic officer or by returning to the United States to reside. Under the law as it now exists, under the Cable Act, she can only resume her American nationality by coming in as a quota immigrant, and I am informed

that in some cases that would involve a wait of eight or ten years, thus imposing a very great hardship on the very many American women whose property interests may be here, whose reason for association with another country may have ceased with the termination of the marital relation, who are American citizens by birth, and who are yet excluded from their native country. I think that is a point which should be considered, and in which there should be some very radical amendments made to the American law.

Mr. KUHN. I excuse my taking the floor again on the ground that we are having a round table conference, and not following the usual procedure. It has occurred to me that the real difficulty is not with the legislation of any one country, even assuming that the legislation of the United States on the subject of nationality is or could be made to be all that is to be desired by any scientific study. Although nationality is recognized as essentially a matter of domestic legislation, still, by reason of the fact that it deals with the relation of the individual not only to his state, but also to states in which he may be temporarily sojourning or domiciled, it requires the legislation of more than one state to accomplish a satisfactory scheme. In other words, conflicts of nationality are the difficulties with which we are confronted in practice, not merely the difficulties of arriving at a suitable scheme of domestic legislation.

We have seen by the discussion here this afternoon that the various systems adopted by countries such as Great Britain, France and the United States, do not fit in with one another, and the idea that a woman has the right to chose her nationality, at least to the same extent that a man has, and that she is not necessarily carried over into the nationality of the man she ultimately marries, has confused the situation; but it is all traceable to the fact that the various systems existing in the countries of the world on nationality bear no relation one to another, and are not coördinated. This, I take it, points to the necessity for, or at least desirability of, international action on the subject of nationality.

Mr. DAVID HUNTER MILLER. I merely wanted to ask a question, if I might. I do not know to whom it should be put. There has been a suggestion of a connection between militarism and one of the two rules upon which nationality is generally based. I would like to ask if anybody knows what practical difference it would make, say, to France, in the way of figures, if the French abandoned their rule. In proportion to the French Army would it make any appreciable decrease in the number of male persons liable to military service in proportion to the number that are liable now? My impression would be—I have never seen any figures about it—that it would be utterly trifling in number, and I wondered if anybody had looked into that to see whether that is so or not.

Mr. HOLLIS R. BAILEY. Mr. Chairman, one of the speakers said just a word about the benefits of nationality and the burdens from want of nationality. I think most of you here are members of the bar, and either pro-

fessors or practitioners in some of the States. Perhaps it has never occurred to you that there is only one State in the Union in which you can be a lawyer without being a national of the United States. I suppose that is one of the benefits of the law of nationality.

I have here a specific case of one of the burdens which has been suggested. It has been said that specific cases are important. A client of mine, a lady born in the United States, of American parentage, and clearly an American national, was married in the United States to a German Army officer many years before the war, who, in 1914, was old enough so that he was a retired army officer. Her father had left her a large fortune after her marriage, which was invested in personal property in the hands of agents in the City of New York. The war came on. She was a German by marriage. She was living in Germany, and the Alien Property Custodian promptly confiscated all her property on the ground that she was an alien enemy. As showing how logical and consistent the Congress of the United States may be in certain cases, after the treaty, when the war came to an end, on behalf of my client I was able to suggest to the Congress of the United States that she was not really an alien enemy. Her property had never been in Germany. There had been no chance for Germany to utilize that property for carrying on the war, and that the Alien Property Act ought to be amended by putting in a few words which would exempt her from confiscation. Recognizing what was said here yesterday, that the rule of taking individual property for meeting the liabilities of a government is something not to be encouraged, Congress passed an Act which made an exception in her case, so that she ceased to have the disability of German citizenship, had the benefits of American citizenship, and her property was returned to her. That was rather interesting.

Mr. GEORGE W. WICKERSHAM. Mr. Chairman, I might suggest that this last statement shows the advisability of all enemy aliens having competent and influential counsel.

Professor GARNER. It has been pointed out that the Cable Act produces three unfortunate situations. First of all, it produces a number of stateless women, which it ought not to do. Any country, in my opinion, which deliberately enacts legislation the effect of which is to denationalize any class of its own citizens or the nationals of other countries for no offense whatever, it seems to me, is committing an act of public immorality. That is what the Cable Act does.

In the second place, it produces a class of women who have two nationalities. I do not consider that very serious. The person who is blessed with a double nationality has no reason to worry.

Mr. KUHN. Not if he is willing to pay two income taxes, for example. The standard of the income tax is a national standard, and the one who has a double nationality, assuming that it is not through any fault of his own, has that obligation, which is quite serious, or has been.

Professor GARNER. It may be serious in particular cases, but, after all, it is the unfortunate woman who has no nationality who suffers most. Then, there is a third class, whose situation is distinctly anomalous, and that is the members of a family with divided nationality, where the husband has one nationality and the wife another. That complicates the matter of the nationality of the children. As has been pointed out here, it complicates also the question of succession to property and of personal capacity, because many countries determine those matters upon the basis of nationality. In such a case whose law shall determine the succession?

Mr. KUHN. May I ask a question, Mr. Chairman? Is there any legislation, Mr. Garner, of which you are aware, that determines the nationality of the children by that of the wife, even assuming that hers is different from that of her husband?

Professor GARNER. I do not know of any.

Mr. KUHN. Then, I do not quite see how that would be an added difficulty, although I must confess that I have found sufficient difficulties.

Professor GARNER. Somebody who has studied this question has proposed that the question of succession to the estate might be adjusted by an agreement between the wife and her husband at the time of marriage, as to whose nationality should determine. That might be done, but it would not be done in most cases. Suppose war breaks out between two countries one of whose nationality the husband possesses and the other the wife possesses. What is the consequence? The husband becomes an enemy of his wife, and *vice versa*. Under the trading with the enemy legislation, certainly as it was interpreted in the United States and Great Britain during the late war, it would be unlawful for the husband to trade with his wife. That is perfectly absurd, of course.

I must confess, however, that I sympathize with the point of view of the women in America who demanded the legislation embodied in the Cable Act, and with the women in England who are fighting for it today, and who are certainly going to win out in the end. Under the law as it was before 1922, an American man might marry an alien woman. He might go and live with her in her own country. He never lost his American nationality. The American Government would protect him. On the other hand, an American woman who married an alien lost her American citizenship even when she remained here in the United States, as the lady in the Mackenzie case did. It is that discriminatory feature of the law as it is in England today to which British women object.

On the other hand, a male alien today cannot be naturalized in England unless he conforms to certain high standards fixed by the law. But any alien woman who succeeds in finding a British husband can go to England, marry him, and acquire British nationality without satisfying any of the conditions in respect to moral character and that sort of thing. Now that women are politically enfranchised, such women acquire, *ipso facto*, also the right to

vote. It is that to which British women object, and in this day, when women are insisting upon equal rights with men and are obtaining them everywhere, I do not see how you are going to answer the complaint which the women of England are making.

In England, on the 18th of February last year, the House of Commons, in fact by a unanimous vote, adopted a resolution expressing the opinion that no British woman who married an alien should lose her British nationality by the mere act of marriage. Belgium has recently done practically the same thing, and Norway, Denmark, Sweden, and Austria have all recently enacted legislation which embodies, in large part, the principles of the Cable Act. So, it seems to me that, however faulty this legislation may be, and it can be amended to remove the defects, whether we like it or not, in my judgment this sort of legislation is going to become general. I do not believe there is the slightest chance that the Cable Act will ever be repealed. It may be modified and it ought to be so as to remove the defects to which reference has been made.

Professor HUDSON. May I ask Mr. Garner if he would have any hope of getting an international convention accepted which would make more or less universal the law as we have it in the Cable Act?

Professor GARNER. I do not know. That is a mere guess. The late Dr. E. J. Schuster, of England, who was perhaps the highest authority on nationality, certainly in England, stated himself that while he was entirely in sympathy with the principle of the Cable Act, he did not believe that it could ever be embodied in an international convention. He said he thought it was useless to expect that such a convention would be adopted. His own suggestion was that it come through concurrent action of the different states of the world, through uniform municipal legislation. On the other hand, the International Women's Suffrage Alliance, as all of you no doubt know, in 1923 proposed a model convention embodying the principles of the Cable Act, and the Swedish Government promised to lay it before the Committee of Experts on Codification. Mr. Wickersham may know whether that has been done, but the Swedish Government undertook to see that the draft of that convention was brought to the attention of the Committee on Codification.

The CHAIRMAN. Mr. Wickersham, do you have any information on that?

Mr. WICKERSHAM. So far as I know, that has not been done. The impression I derive from contact with the different theories on the subject of international law at Geneva, leads me to believe that it would be absolutely impossible to expect either a treaty or concurrent action from the civilized Powers, in support of such legislation as the Cable Act. Personally, I can hardly express my feelings about the Cable Act in parliamentary terms!

Professor CHARLES G. FENWICK. I should like to ask Mr. Flournoy why, when the Cable Act came up before the President, the State Department did not advise him to veto it.

Mr. FLOURNOY. I cannot answer that question. I had nothing to do with it myself. I would have vetoed it.

The CHAIRMAN. We have only gone into a part of the subject. There is a great field open for discussion. I hope the discussion will continue.

Professor PHILIP MARSHALL BROWN. Mr. Chairman, this subject has interested me enormously of late, in view of the rather large list of applications which the Permanent Court of International Justice has received from individuals who are without any redress whatever in regard to their nationality, property rights, and other interests. Those of you who have seen the report of the Permanent Court of International Justice may have been struck by the pitiful condition of some of these perfectly worthy citizens domiciled in various countries of Europe, who, owing to the changes under the Treaty of Versailles and other treaties, find themselves not only without any rights, but without any agent to represent them. They have appealed to the Court of International Justice, and the court has been compelled under its statutes, to reply that it knows of no way of giving them help. Their situation is particularly unfortunate because of the fact that one country may claim a particular individual for purposes of revenue, or may claim his property for some reason. That nation will not present the case to the court, nor will another nation which has repudiated this individual take the case before the court. To my mind this situation has this most interesting potentiality, namely, that sooner or later international law must take cognizance of the rights of individuals. We have too long spoken of international law as applying only between sovereign states. We are having accumulated instances where individuals have rights that are not protected because of the reasons I have indicated in this case, or because they may not enjoy the favor of a particular government. I am hopeful that in the evolution of the science of international law, before long, a great many more publicists, a great many more statesmen, and, I trust, that such a commission as Mr. Wickersham is a member of, will be willing to consider this whole topic of the right of individuals in a democratic period to be protected, irrespective of the question whether some sovereign is gracious enough to take up their case.

Professor BORCHARD. There has been some development along the lines Mr. Brown mentioned. The Central American Court of Justice provided that individuals could sue. The statute of the International Prize Court, which unfortunately was never established, permitted individuals to sue without the support of their states. The late war has shown how valuable that would have been to the world. I think the Mexican-American Claims Commission has just made a pronouncement along the lines you mention, namely, that international law will take account of the individual. How far they intend to carry that I do not know, but I think the development is certainly a desirable one, to permit an individual to sue before an international court even if his government does not support him. The more

we subject nations to suit, even against their will, the better for the development of law, although that is still very far away.

Mr. WICKERSHAM. I think in that respect we will have to begin at home, and get rid of this doctrine that we cannot sue our own government in its own courts because of this antiquated theory of sovereignty. When we have met that question, and made that beginning, then we can begin to talk about it from the international standpoint.

Professor BORCHARD. There is now pending before Congress a bill enabling the United States to be sued in tort in property matters, without limitation of amount. In personal injuries they are not quite ready to take the plunge beyond $5,000.

Mr. WICKERSHAM. I wish I could think of some reasonable chance of its passing.

Professor BORCHARD. It has been favorably reported out by the House Claims Committee, and the Senate has already passed a somewhat emasculated bill limiting the award to $3,000. I think the chances are good.

Mr. MILLER. Mr. Chairman, there is a great deal more to do than to permit the government to be sued in tort for $3,000, as was suggested in the debates in the House, or possibly $5,000. For example, the government, on a contract claim, when it has, as the Supreme Court finally holds, withheld unjustly and unlawfully the money of the citizen, should pay some interest on it, not from the date of rendering the judgment, which has recently been accorded as a matter of grace, but from the time the government should have paid the money. That is one instance of a great many where this antiquated idea that time does not run against the king, that the king can do no wrong, and so forth, is an injustice in our own courts to our own citizens.

Professor HUDSON. Mr. Chairman, I should like to ask Mr. Flournoy a question. Admitting that an international convention dealing with nationality of married women would not be possible, and admitting that an international convention, in the sense of question 1 (a), that is, adopting the *jus soli* or *jus sanguinis*, or a more general rule as a basis of citizenship, would not be possible, what does Mr. Flournoy see as possible international action in this field? I am not certain, from having heard most of his paper, whether he would answer question 1 (b) in the affirmative or not, and I should like very much to have Mr. Flournoy outline for us the kind of international convention or conventions that he sees as practicable for dealing with this general subject.

The CHAIRMAN. Will you read question 1 (b) to us, Mr. Hudson?

Professor HUDSON. (Reading.) "If it is deemed impracticable to adopt a single, uniform basis for native citizenship to prevent dual nationality from arising at birth, would it be possible to obtain the adoption of a uniform rule under which dual nationality would be terminated when the individuals concerned attain the age of majority or shortly thereafter?"

Mr. FLOURNOY. I should answer that in the affirmative. That is, I

think it is possible. I do not think it is by any means certain that such a rule could be adopted. It would certainly be reasonable, in my opinion, to have such a rule for terminating this unfortunate condition of dual nationality after the person has reached the age of majority. I have given a good deal of thought to that, and I have had to handle hundreds of cases involving dual nationality at birth. As I stated in the paper here, they merely relate to persons born in the United States of alien parents. We have very little trouble with persons born abroad of American parents. They are practically negligible. But we have hundreds of cases of Czechs, Austrians, Hungarians, Serbs, Italians, and Greeks who were born in this country and have gone back, or were taken in childhood to their parents' country and have been brought up there. They speak the language of that country and know nothing about the United States themselves. They have no interest in this country, really, except, in many cases, the desire to avoid the obligations of the other country, and particularly the obligation of military service.

The suggestion I have made for a solution is the simple rule that the domicile of that individual at the time when he reaches the age of majority—perhaps it would be better to say one year after the time when he reaches the age of majority, or two years—should determine his nationality thereafter. For instance, a person who was born in this country of Hungarian parents and taken in childhood to Hungary and has lived there ever since, when he reaches the age of 22 years and is still there, should thereafter be Hungarian and not American. No declaration or mere empty formality should figure at all, but his own actions should determine his status after reaching that age.

Professor HUDSON. May I ask whether the nations of the world have any common law of domicile which would enable you to apply such a rule? Would not that necessitate a codification of the law of domicile?

Mr. FLOURNOY. It seems to me that there is some general agreement as to what domicile means. I suppose there may be some differences. I have no doubt there are. It would be entirely practicable, I should think, to define "domicile," and say exactly what it is, in the code. For instance, as in our Act of 1907, the place of the individual's general abode, that is, the place where his home is, should be deemed his domicile for the purposes of this law.

Professor HUDSON. Mr. Chairman, I do not know whether this is a proper question or not, but I would like to ask Mr. Flournoy to say whether it is proper. If international action of the kind you suggest would be useful and would be to the advantage of the United States, has the Government of the United States taken any action at all which would look toward any international law dealing with this whole subject, or are we just leaving the situation at loose ends? We continue to discuss it here. We have discussed it for many years, and we do not seem to advance the state of international

law on the subject very much. Has any action been taken by our government which would attempt to bring about some progress in international legislation in this field?

Mr. FLOURNOY. No action, to my knowledge, has been taken.

Professor GARNER. I may say, Mr. Hudson, that the author of the Cable Act two years ago, I think, introduced a resolution in the House of Representatives providing for the calling of an international conference for the purpose of regulating this whole matter of the nationality of married women. I do not think it ever got any further than the stage of introduction. I should like to ask Mr. Flournoy, if I may, in connection with the subject of election in the case of dual nationality, if he would qualify the right of election at all. Take, for example, the child of French parents born in the United States. Upon the attainment of his majority if he continues to reside in the United States, would you allow him to elect French nationality and continue to reside here?

Mr. FLOURNOY. My suggestion was that his domicile at the time when he reaches the age of 22 years would determine. If he was then domiciled in the United States, he should thereafter be an American citizen and not a French citizen.

Professor GARNER. In other words, he would not have any right of election.

Mr. FLOURNOY. His own act would be his election.

The CHAIRMAN. The matter of dual nationality was spoken of. I see present a distinguished member of another nationality. I would like to ask Mr. Pergler if he would say something on that subject.

Mr. CHARLES PERGLER. I prefer not to, Mr. Chairman, except that I would like to make this suggestion in view of what Mr. Hudson said. It is well to look at the matter also from the point of view of the government. Certainly it is not desirable to have a situation of dual nationality, if for no other reason, because conceivably an individual man or woman might today ask the protection of one government and tomorrow that of another.

With reference to one nationality of the husband and another of the wife, take also the question of the regulation of property rights by treaty. The practical disadvantages were discussed here, and I think very likely if those situations have not arisen, they may arise. You may have a situation where the property rights of a wife under a treaty could be regulated differently from those of a husband. I submit that that sort of a situation is not to the advantage of either party, and it is certainly not advantageous from the social point of view.

Miss HOPE K. THOMPSON. In listening to this very illuminating discussion on American women retaining their American nationality after marriage, I have not heard discussed a practical question which women's organizations discussed before they brought up the subject, and that was that an American woman marrying an alien quite often lost control of her property. It was

felt that the women with large fortunes protected themselves by having ante-nuptial agreements. A great many women suffered, who were unaware that their property control would be lost by marriage. If they retained their American nationality and remained in this country, that question did not arise, but if your bill is amended so that they become foreigners unless they do some overt act to retain their American citizenship, that control will be lost. While I do not think anyone believes that the Cable Act is perfect in every respect, the law is a little better than it was before.

Professor HUDSON. I must confess that it is not clear to me how married women will lose control of their property. I must not know something about the law of property that various people keep referring to here today. I was reared in a school that refers most questions of the control and devolution of property to the law of the *situs*. I was not aware that there were these great difficulties. I see the particular difficulty Mr. Borchard pointed out, which is certainly not a difficulty of dual nationality, where a person taking property in this country may be an alien under our law and may be subject to disabilities in dealing with the property which aliens have; but beyond the case that Mr. Borchard raised, I am not at all clear as to the difficulties in dealing with property which have been spoken of by several people.

The CHAIRMAN. Miss Thompson, will you answer that?

Miss THOMPSON. The case I had reference to was an American woman who married an alien. Before she married him he took out his first papers, but he never completed his naturalization, and the question came up whether she could leave her property by will or not. She was very much disturbed to find that the law of her husband's country would apply if she died.

The CHAIRMAN. The law of the country her husband would have had when he completed his naturalization?

Miss THOMPSON. No. I mean the law of his original country. Naturally when he is naturalized, he becomes an American citizen.

Mr. HAZARD. I certainly do not understand that case. If her property was in New York, I assume that her power to dispose of it after her death was governed by the New York law.

Miss THOMPSON. As regards foreigners?

Mr. HAZARD. Certainly.

Mr. PERGLER. Of course, it is true that the general proposition of the devolution of property is regulated by the law of the *situs*, but it is equally true that governments do enter into treaties regulating the descent of property, or that they may do so, and it has been done; so it is at least conceivable that the personal property, at any rate, of a husband, might descend under entirely different rules than the property of the wife.

Mr. BAILEY. Here is one illustration of the danger a woman may run, in a property way, in changing her nationality. A lady, who was a British

citizen down in Nova Scotia, owned a valuable lot of shares in an English steamship company. She began to change her nationality and acquire nationality in the United States. Before she had completed the process and had become an American citizen, she found she would lose her right to hold those shares if she did become an American citizen. Under English law only a British subject could hold shares in that steamship company, so she gave up the idea of becoming an American citizen and hung onto the idea of continuing her ownership in those shares.

Professor BORCHARD. Mr. Chairman, I think the question Miss Thompson raised is not a difficult one, because even if there is an advantage generally in the matter of property in retaining American citizenship, Mr. Bailey has shown that that may sometimes be a disadvantage. Even if there is such an advantage, she can preserve it by stating that she desires to retain her American citizenship. She is not being deprived of anything at all. She merely has to do an affirmative act, and say she wishes to remain an American citizen. I cannot see that that is a particular hardship. It simply requires the expression of a desire.

Mr. KUHN. If there is no further discussion on this immediate question, I should like to discuss another which Mr. Flournoy brought up, and that is the determination of these questions by domicile. He mentioned the case of double nationality at birth to be determined by domicile, either upon arriving at the age of majority or a year thereafter. The general tenor of his paper seemed to be very strongly in favor of giving domicile a great influence in the determination of nationality where there was double nationality. Undoubtedly there is a great deal to be said for that, but my own feeling is that the modern tendency is to allow the individual a choice in the matter of his nationality, and the question of domicile working automatically, without any consideration of the will of the party as to its effect upon his nationality, operates against what I consider the modern principle.

On the program we had the question of the American legislation on expatriation, dating back to 1868. If I understand the spirit of that legislation, for which the American State Department contended over a period of several decades, it is that there was a natural right of choosing nationality. If there is a natural right of changing from one nationality to another by exercising the right of expatriation, why should we neglect the principle in determining, *ab initio*, what nationality a certain individual belongs to? In that respect it seems to me that the principle of allowing some public declaration of choice, as recognized on such a wide scale in French legislation, is worthy of consideration, because it gives the individual a wider sphere of influence over his own destiny.

Mr. FLOURNOY. Mr. Chairman, the rule that I suggested is not a mere arbitrary mechanical rule to dispose of cases. It is based upon principle, and that is the principle that citizenship means something; that the individual who has citizenship and has the benefits of citizenship has certain obligations,

and that, generally speaking, those obligations involve residence in the country of nationality. That is the principle underlying it. The same principle underlies the Expatriation Act of March 2, 1907, and the provisions in our naturalization treaties that a naturalized citizen who returns to his native country and takes up his residence there shall be deemed to have renounced his naturalization. Those treaties, as you know, go back to 1868. That is the principle underlying the proposed rule. After all, the rule does not interfere with the will of the individual. The individual can change his domicile. He is not obliged to stay in the other country. For instance, the Czech who is born in this country, or happens, by pure accident, to have been born here, and lived all his life in his parents' country, if he wants to be a real American, should come to this country and be one. That is the idea. He is perfectly free to come.

The CHAIRMAN. Did you have something to say, Mr. Hudson?

Professor FENWICK. I was about to ask Mr. Flournoy what are those rights and duties of citizenship? It seems to me that the status of the property of aliens in the United States is determined by certain fixed rules. It is subject to the same obligations as the property of citizens, and to my mind the whole line of development here should be to make citizenship more elastic, that is to say, to let domicile determine, and to encourage dual nationality, if you like, until such time as every man will be, perhaps in the distant future, a citizen of the state wherein he resides, which is the rule, of course, of our American Constitution. What are these obligations of citizenship that an alien is not called upon to meet?

Professor HUDSON. An American living abroad?

Professor FENWICK. Yes. We see the whole question of nationality is tied up with the rights and duties and citizenship, and it is quite impossible to formulate any satisfactory general law of nationality until we have worked out the question of the status of aliens, and I assume that Mr. Wickersham will impress upon us, if need be, how large a part that must form in the proposed codification of international law. Eliminating the one item of military conscription, which we hope will soon disappear, the only other question that really makes the nationality problem a difficult one is the status of the alien. That is the first object of attack. Having settled that, it seems to me that elasticity of citizenship, by making domicile determine, will be the true line of development.

Mr. WICKERSHAM. I must confess that I would like to register a distinct protest against the conception of nationality as a purely mechanical thing having to do merely with property interests or the performance of certain mechanical duties. I think nationality is something much deeper than that. I think it comes down to a wholehearted allegiance to your country and its institutions, its traditions, its history, and all those things that go to make up that which fires one's soul when one thinks of his country when she is in peril.

I think that nationality is not something to be put on and taken off like a coat. You cannot change nationality over night. Why did we provide in our statutes for a period of five years before an alien could become a citizen of the United States? It was in order that he could, so far as a stranger can, absorb these principles, these ideals, and become attached to the institutions of our government, so that, although he had not the benefit of the traditions that come through blood, through associations, through ancestry, and through all those glorious memories that go to make up the woof and fabric of our tradition and our background of thought, he should, so far as possible in a new country, absorb them. I would like to extend the time. I would make it a longer period. I think very few people today can become good Americans in five years. I would compel a man to show that he had absorbed all those things that go to make up a real, true American, such as we think of when we speak of America.

Among other things, he should lose, perhaps, some of the intolerance that comes from the conversion, after a short period, from one nationality to another. I think that we have gone far afield from the conception of nationality when we are talking simply of property interests, the right of suffrage, and things like that. It is a deep, *spiritual* thing, which cannot be put on and taken off in a moment without immeasurable loss.

The CHAIRMAN. I think we are all grateful to Mr. Wickersham for striking this fundamental note in the matter of nationality. We certainly have had a most enlightening discussion on the subject. Everyone who wished has contributed his part. I must confess that I myself would have liked to have heard a little more of the discussion on what seems to me to be the practical part, that is, in addition to what Mr. Wickersham has said, for what he has said, since he expressed the deep sentiment of our natures, was, for that very reason, most practical. The second practical point is the right or the obligation of diplomatic protection, which is the real test of nationality, in the long run. If you wish to get one law of nationality, it must, it seems to me, be drawn as the compromise line at the point where one nation insists on protecting its own, and the other nation recognizes that right. At the present time it seems to me the nations are more interested in competition than they are in coöperating as agents for the enforcement of international law, and in the conflict of their competitive ideals they stretch their respective values of nationality to the breaking point.

Nationality, then, rests upon this deep conception that Mr. Wickersham has expressed, and we must draw the line at the limit of protection, and the determination of that limit is influenced by certain factors. The first is the coming to the fore of the right of the individual. Certainly we must recognize that woman is coming to the fore with her individual right to have the nationality of her choice. I remember being in a boarding house in Paris. There was a pleasant flirtation between a Frenchman and a German girl who was visiting there seeing Paris. When I came back in a few weeks they

were married. I very tactlessly said, in a joking way "How do you like being a French woman?" She became much excited. "I am not a French woman, I am German," she said. She cared enough about this Frenchman to marry him, but she did not wish to take over his nationality. She had still a deep loyalty to Germany.

The point where the law of nationality in the long run will be drawn will come at the point where the nation stretching its desire to protect its nationals, finds that it is too expensive, that the game is not worth the candle. That is the place where it stops.

Then, there is this influence of the individual who wishes to put off his nationality, that is to expatriate himself. This makes a complication. Then, there is the competition of states, rising over and above their desire for coöperation, which complicates the matter still further, and that is where you have the great difficulty in this mess of conflicting influences. So far as I can see, there does not seem to be any present chance of getting a uniform law of nationality.

The program, as we have it, permits the continuation of this discussion tomorrow morning at 10 o'clock, but it would seem, unless there are some phases of the matter recently brought out that you wish to go into further, we have covered the matter to the satisfaction of the members present. It might, therefore, be a good idea, when we meet tomorrow morning at 10, to discuss this subject further, which is the order of the day, and then, within the limits of our scientific purpose, to open the discussion to related or even somewhat distant topics.

Let me call your attention to the program for this evening. When we convene tomorrow at 10 o'clock we shall continue the round table discussion on the codification of international law in respect to nationality.

If there are no further remarks the society will stand adjourned until this evening.

(Whereupon, at 4 o'clock p. m., the society adjourned until 8.30 o'clock p. m.)

Reception by the President of the United States

On Friday afternoon, April 23, 1926, at four thirty o'clock, the members of the Society were received in the White House by the President of the United States and Mrs. Coolidge. The Honorable Charles Evans Hughes, President of the Society, presented the members. Sixty-nine members were present.

FOURTH SESSION

Friday, April 23, 1926, at 8.30 o'clock p. m.

The Society was called to order at 8.30 o'clock p. m., by the Honorable Charles Evans Hughes, President of the Society.

The PRESIDENT. Ladies and Gentlemen: It is an especial privilege to introduce to you the guest of the evening. I will not say that we appreciate his coming to us from a long distance to address the Society, for we never think of Cuba as very far away. We are gratified to greet the representative of our sister Republic, to which we are related by the closest ties of friendship and mutual interest. I know that our guest has the greatest pride in the wealth and resources and prosperity of his country, a pride in which we all share. I am sure that his country takes an equal pride in her foremost jurist. It is no small honor for Cuba that no one anywhere in the world would attempt to enumerate the distinguished international jurists of our day and would fail to number among them the guest whom we have the honor of greeting tonight.

There is another reason, however, for our gratification. You may remember that in January, 1924, the Governing Board of the Pan American Union requested the American Institute of International Law to consider the preparation of projects to aid the work of the Conference of Jurists that was to meet in Rio de Janeiro. That invitation was accepted and very important progress was made. Indeed, it became possible a little over a year ago to present to the Pan American Union the report of the committee that was set up by the American Institute, a report which actually presented projects or definite statements of law deemed to be peculiarly applicable to the relations of the American Republics. That report was prepared by our friend. He took a leading part in the work of the committee of jurists. He stands eminent among the jurists of this hemisphere, and represents, we may say, in a sense, this hemisphere, as he does all the world, as a member of the Permanent Court of International Justice. I have the greatest pleasure in introducing to you Dr. de Bustamante of Havana.

THE PROGRESS OF CODIFICATION UNDER THE AUSPICES OF THE PAN AMERICAN UNION

ADDRESS BY ANTONIO S. DE BUSTAMANTE

Professor of International Law at the University of Havana

Mr. President, Ladies and Gentlemen:

Eleven years ago, in 1915, the American Society of International Law had the happy idea of selecting for one of its sessions the following most important theme: "Should international law be codified? And if so, should it be done through governmental agencies or by private scientific societies?"

The first to speak on this subject was Mr. Simeon E. Baldwin, formerly Governor and Chief Justice of the Supreme Court of Connecticut and then the President of the International Law Association. He maintained clearly and conclusively that "so far as we can reason from the past, the safest initiators of legal statements in code form, are private individuals, acting either solely by themselves or through private scientific societies to which they may submit their views." "Originally," he said, "a single head can best conceive the general form and expression of any work of codification. One man can give it unity, but he cannot give it completeness. Let him do his utmost and it will contain faults and omissions which the careful study of others, suitably qualified, will not fail to detect. I believe that, in pursuing this method of collaboration, a committee of a scientific academy or association, of recognized merit, is more likely to achieve success than a commission constituted by public authority. Such an agency of government must, of course, be invoked at some stage of the process. The work of no scientific body could safely be accepted without examination by public authority. But such an examination may wisely be deferred until the efforts of private individuals and private organizations of individuals have been fully completed."

At the end of the same session in which these accurate predictions were made, the same theme was discussed in his turn by another speaker, of whom there may and ought to be repeated these words which I endorse and which were used by the Chairman, Dr. Charles Noble Gregory, in presenting him that afternoon:

> Some of us have dreamed of an ideal statesman, and we have thought of him, first, as one who serves the public earnestly and devotedly, letting advancement take care of itself, so far as he himself is concerned. We have thought of him as a man of undoubted integrity, of wide experience, of profound scholarship, of a mind tenacious, resourceful, steadfast. We have thought of him as a man capable of leading a great legislative body so that he there established a standard of public service and public duty. We have thought of him as a man who at the head of a cabinet would administer as well as discuss, and could there leave a standard never surpassed. We have thought of him as a man who could preside over and direct a great constitutional and constructive convention in a way at least to command the admiration of his country. I am deeply honored and profundly happy to present here one who conforms in every particular to these dreams of an ideal statesman and public man, our beloved fellow-citizen, Hon. Elihu Root.

In the course of his notable discourse, Mr. Root was impelled to say:

> I want to express entire harmony with what Governor Baldwin said a few moments ago upon the other branch of the question, as to whether codification should be by governmental agencies or by private societies. It is not practicable that governments should do the threshing out of questions necessary to reach a definite statement of a conclusion. That has to be done with freedom from constraint by the

private individual doing his work in a learned society or in private intercourse.

"So I think," he added, "it is quite clear that the process of codification, step by step, subject by subject, point by point, must begin with the intellectual labor of private individuals and it must be completed by the acceptance of governments. The process must have both private initiative and governmental sanction."

And it is really astonishing that the Pan American Union should have proceeded in just that way, without the slightest deviation from such masterly advice. On its progress in this matter I have the pleasant duty to report tonight. When the nations of America assembled in the International Conference of Washington of 1889, called on the initiative of the Secretary of State of the United States, Mr. Blaine, the idea of international codification, cherished since 1826 by the Congress of Panama, occupied the first place in its hopes and played an important part in its resolutions.

The arrangements for arbitration, the declarations as to the right of conquest, the permanent neutrality of the Intercontinental Railroad, sanitary and customs regulations, the resolutions as to patents, trademarks, weights and measures, the recommendations as to the covenants of Montevideo and the treaty of extradition, which among other important things were accepted in that memorable first congress of the three Americas, were nothing less than chapters or articles in a future project of a general code. And, under the modest name of International Bureau of the American Republics, there came forth also from that congress that common organ of the independent nations of this western hemisphere which from then on has increased in attributes and activities until it has developed into the present Pan American Union.

The second conference which convened in Mexico City in 1902 represented a more decisive and evident step along the road of international codification. This time the Brazilian delegation took the initiative, making the proposal of the appointment by the International Bureau of the American Republics, of three jurists who should prepare for the nations of this part of the world a Code of Public International Law and another of Private International Law. The final resolution raised to seven the number of jurists who were to do this work, five Americans and two Europeans, and on the 27th of January, 1902, a convention to that end was signed by the states which had come to the conference and were still at that time represented in it.

Nor did the conference stop there in dealing with matters appertaining to both branches of international law, for there were adopted there also important resolutions concerning the exchange of publications, the protection of literary and artistic works, patents for inventions, industrial drafts and models and trademarks, extradition and the protection against anarchism, the exercise of liberal professions, international sanitary police, rights of alienship and claims for pecuniary damages.

The convention of January 27, 1902, to which we have referred had not

been ratified when the third American International Conference met in Rio de Janeiro in the month of July, 1906. It was natural, therefore, that the matter should return to figure in its program, and, as if they desired to show the great interest which it had awakened in all America, the delegation of the United States of Mexico and the delegate of the United States of America, Dr. L. S. Rowe, who with such great ability and skill now directs the Pan American Union, and the delegates from Peru, Guatemala and Uruguay, gave most important and useful hints as to the means competent to attain that end.

The result of these motions and observations and of an interesting general discussion as learned as it was practical, was a new convention of August 23, 1906, for the constitution of an International Commission of Jurists, composed of one representative from each signatory state appointed by his respective government, which was to draw up a draft of a Code of Public International Law and another of Private International Law and which should be formed in Rio de Janeiro during the year 1907.

Things being in this state, and before the commission had begun to act, the fourth International Conference met in Buenos Aires on July 12, 1910. There some delegates, among whom particularly those of Chile ought to be mentioned, reiterated the interest in codification and the desire that it be brought to completion, and as the Pan American Union took charge of trying to obtain the ratification of the resolutions and conventions adopted by the different conferences, thanks to its exercise of this function, so useful, so necessary and so skilfully executed, it was possible to prevent the aims of the Conference of Rio de Janeiro from coming to naught. At the proposal of the Ambassador from Brazil, the Union resolved on December 27, 1911, that the Commission of Jurists should convene in July, 1912, and that each state should be allowed to send two delegates in place of one, without altering thereby the unit vote of the respective nations.

The commission met in fact on the date proposed and began its work, studying certain preliminary problems and dividing itself into subcommittees in order to begin the codification; but various causes, the chief of them all being the World War, which began in 1914 and which ended with the treaties of 1919 and 1920, prevented any final work of such a nature as required another atmosphere and state of international affairs. There should be pointed out, however, the most important fact that for the meeting were prepared two drafts of codes noteworthy in many ways: one for public international law by the eminent statesman Sr. Epitacio Pessoa and the other for private international law by the able jurist Sr. Rodriguez Pereira. And finally, in the subcommissions there must be mentioned also the draft of an extradition treaty by the illustrious professor of Columbia University, Mr. John Bassett Moore, and the drafts approved provisionally, which in the third of these subcommissions were framed by Sr. Alejandro Alvarez, of whose indefatigable industry and well-known ability there are so many proofs in this American movement of which we are now speaking.

This was the situation when there convened in Santiago, Chile, March 25, 1923, the fifth and until now last American International Conference. In its program the study of the work done on the codification of international law by the Congress of Jurists of Rio de Janeiro had a conspicuous place, and after a most interesting report by the delegate from Chile, Sr. Carlos Aldunate Solar, and a debate, as dignified as it was profound, in which a good number of delegations took part, there was drawn up and approved a resolution presently transformed into a convention, which statement of purposes commenced with the supremely important affirmation that the convenience of the codification of international law is undeniable. In its dispositive part, and among other things of no less importance for this purpose, the Governments of America were asked to name two delegates each, to form said Congress of Jurists, called to convene in the year 1925 on a date to be determined by the Pan American Union with the assent of the Government of Brazil.

Meanwhile and in the interim between the Conferences of Buenos Aires and Chile, there had been constituted in an absolutely extra-official and scientific form the American Institute of International Law, composed of four members of each of the Republics of America, each of which in their turn were to have a national society dedicated to the study of this subject. There presided over the Institute at its creation he who continues to preside over it at present, Mr. James Brown Scott, so well known to you all, who combines in a very high degree qualities so opposed as the faith of an apostle, the wisdom of a sage, the indefatigable energy of a propagandist and the practical common sense of a man of affairs. Friend of all America which might well be called his great Fatherland, he has realized for some time past that if the North American colonies, upon declaring themselves independent of England in the eighteenth century, were not secure in the very life of each of them and in their collective attainment of common aspirations, until they had codified their political law in a Constitution which still governs them satisfactorily to all, the states of the whole world and in particular those of the American hemisphere will not enjoy in complete security their independence and their sovereignty, nor will the collective necessities of a juridical international community be fully satisfied, until those rules of their living together which form their external public law are reconstructed and established in the form of international codes which all shall prepare and accept and in which there shall be a permanent regulation of their common interests guaranteed and strengthened by the liberty and legal equality of all.

It was necessary to bring together these two great forces, the Pan American Conferences and the American Institute of International Law, uniting science and diplomacy in a single work, acceptable to all and desired by all. Consequently the Governing Board of the Pan American Union, on January 2, 1924, tactfully and opportunely adopted the following resolution:

Whereas the Fifth International Conference of American States adopted a vote of thanks for the results achieved by the American Institute of International Law; and

Whereas one of the purposes for which the American Institute of International Law has been established is to secure a more definite formulation of the rules of international law; and

Whereas the codification of the rules of international law is the most important task intrusted to the International Commission of Jurists; and

Whereas the labors of the American Institute of International Law will be of great service to the International Commission of Jurists in the fulfillment of the task assigned to it; Be it

Resolved by the Governing Board of the Pan American Union, to submit to the executive committee of the American Institute of International Law the desirability of holding a session of the Institute in 1924 in order that the results of the deliberations of the Institute may be submitted to the International Commission of Jurists at its meeting at Rio de Janeiro in 1925.

When that distinguished statesman, then Secretary of State of the United States, Mr. Charles Evans Hughes, in his capacity of President of the Pan American Union, communicated these resolutions to the Institute of International Law, he used the following language which contains an undeniable truth and a prophecy already confirmed by the facts:

The Commission of Jurists, provided for by the Santiago resolution, is called upon to perform a very great international service, and I feel convinced that in the performance of this service the American Institute of International Law can be most helpful. I hope, therefore, that the suggestions submitted by the Governing Board of the Pan American Union may have the approval of the executive committee of the American Institute of International Law. The establishment of such close coöperative relationship will serve to advance the work which the commission is called upon to perform and will thus bring us nearer to the accomplishment of the purpose for which the International Commission of Jurists was established.

The indefatigable and enthusiastic President of the Institute, Mr. James Brown Scott, compelled to take a trip to Europe by other professional duties, took advantage, nevertheless, of the opportunity to make a start at this most difficult task. He must then have asked himself inwardly these two questions, which contain two unanswerable arguments: If a digest may be made of the law, as that of Moore or that of Wharton, why not a code also? And if, when it is necessary, it is easy to find international doctrines in the books and in court decisions, why may they not be incorporated into treaties?

In the capital of France he sought and obtained the collaboration of the illustrious Chilean publicist, Sr. Alejandro Alvarez, whom we have already had occasion to mention, and of the no less illustrious professor and statesman, Sr. Luis Anderson, who also are members of the governing board of the American Institute. The task was finished with surprising rapidity, and on

October 12, 1924, the day on which is commemorated the discovery of America, he was able from Paris to address to all the members of the Institute invitations to a meeting to be held in the capital of Peru, at the end of that year, for the purpose of discussing projects of a codification of international public law.

There the Institute studied them, although in informal meetings, leaving the final revision to a commission of itself which met in Havana during the following February, and which agreed upon thirty projects, each of the members reserving his opinion upon certain specific points.

These thirty projects begin with a preamble which contains among other things the two following principal declarations:

> The American Republics are of the opinion that to preserve the peace it is necessary to study carefully the causes of war in order to prevent its possible outbreak; to base international relations upon justice while gradually extending the domain of law, and in every case peaceably to settle the disputes which may arise between nations always with due respect to their independence, their liberty and their legal equality; and
>
> The American Republics are more interested in regulations concerning the peaceful relations of the nations and neutrality than in those concerning war, in the hope that the latter has happily and forever vanished from the American Continent.

Various general declarations follow and two special declarations upon the unity and coöperation of the American Republics, taken from most important public speeches of Mr. Elihu Root while he was Secretary of State.

The fourth project is dedicated to the fundamental bases of international law, fixing its nature and extension, the elements which compose it, its sources and abrogation, the obligatory force in America of international rules, customs or practices, the development, interpretation and sanctions of said rules and the value of national laws, diplomatic precedents, arbitral awards and opinions of publicists. Further on, in another convention, are stated the elements which enter into the international conception of a nation, and this most important affirmation is made:

> Nations are legally equal. The rights of each do not depend upon the power at its command to insure their exercise. Nations enjoy equal rights and equal capacity to exercise them.

The recognition of new nations and of new governments constitutes the subject matter of project number six, which, among other things, prohibits conditional recognition and regulates the recognition of *de facto* or abnormally constituted governments. The seventh contains, with some additions, the Declaration of the Rights and Duties of Nations, which was one of the first resolutions of the Institute and which has won such commendation and praise from public opinion and from important scientific bodies, American and European. This is supplemented in project number eight, by another special declaration as to the rights of American Republics which establishes, in case of its violation, recourse to the Governing Board of the Pan American Union.

That office of the Union, so fruitful and increasingly necessary, is recognized by project number nine, augmenting in so far as possible its attributes and powers and emphasizing its character as the center of American life, as a powerful mechanism for its international regulation and as the instrument through which public opinion may become cognizant of, may appraise and perhaps may morally censure violations of international law.

National sovereignty over lands, seas, lakes and water-ways, and the rights and duties of nations who have interests in territories in dispute on the question of boundaries, the last almost constantly applicable in America from the time of its independence, are the subjects of two important projects, numbers ten and eleven respectively. Closely linked to these is that which follows, and which deals with the exercise of national jurisdiction within and outside of each state. Two more projects complete this subject, dedicated to the international rights and duties of natural and legal persons and to the controversial problem of immigration. The responsibility of governments, diplomatic protection and extradition, matters between which there exists an obvious inter-relation, provided the subjects of the next three projects, ending with number seventeen.

Freedom of transit, navigation of international rivers and of the air give rise to three other projects, numbers eighteen to twenty. The first is inspired by the resolutions of the International Conference of Communications and Transit of Barcelona, held in 1921, and the last by the Convention of Paris, of October 13, 1919. It recognizes, as did that convention, the fundamental principle of property rights in the air, which seems to have entered into international practice. The first article declares that every nation has complete and exclusive sovereignty over the air space above its territory, but it substitutes the Pan American Union for the ill-balanced and irritating International Commission created by the Convention of Paris.

After another project relative to treaties, which fixes their conditions and establishes their binding international efficacy, two of them, the twenty-second and the twenty-third, set forth the customary and convenient doctrines and practices as to diplomatic agents and consuls, and two others, the twenty-fourth and twenty-fifth, provide for the exchange of publications and the interchange of professors and students, matters of great moral and intellectual importance for our hemisphere.

Maritime neutrality, to which is devoted project number twenty-six, gives occasion for the following general declaration:

> In case of war between two or more countries, the American Republics consider it a duty to remain neutral and to contribute to ending the dispute by the offer of good offices or mediation.
>
> The exercise of that right can never be considered by the parties as an unfriendly act.

The guarantee and sanction of this obligation is found in the second article, which reads as follows:

> In order to insure respect for the rights of neutrals, and particularly the freedom of commerce and navigation which exists in time of peace, the Governing Board of the Pan American Union, immediately upon the declaration of war, shall meet to examine the common interests of the American Republics.

The next project, which in large measure reproduces conventions as to the matter approved in the Peace Conferences at The Hague, in 1899 and 1907, treats of the means for the pacific settlement of international difficulties, and is supplemented by project number twenty-eight, relative to the organization of a Permanent Tribunal of Justice. These precautions do not preclude possible recourse to measures of repression which, without involving war, may aid in resolving questions arising between nations or in enforcing arbitral or judicial decisions, and it is with such measures that the next to the last convention, number twenty-nine, is concerned.

The thirtieth and last project, which has its origin in the already mentioned resolution of the First Pan-American Conference of Washington, refers to conquest, and declares that:

> in the future territorial acquisitions obtained by means of war or under the menace of war or in presence of an armed force, to the detriment of any American Republic, shall not be lawful, and that
>
> Consequently territorial acquisitions effected in the future by these means can not be invoked as conferring title, and that
>
> Those obtained in the future by such means shall be considered null in fact and in law.

This hasty enumeration ought to convince the most incredulous of the importance and complexity of the questions already regulated by the Institute in the field of public international law. If a graphic and material proof of their extent were necessary, suffice it to say that they comprise, without including the preamble, 354 articles and hence, divided into chapters and sections, they would form more than one book of a General Code of Public International Law.

The best commentary thereon is to be found in the following words of the lofty discourse with which the then President of the Governing Board of of the Pan American Union, the eminent Secretary of State, Mr. Hughes, transmitted them to the Union:

> What is far more important, at this moment, than any particular text or project, is the fact that at last we have text and projects, the result of elaborate study, for consideration. We have the inspiration and stimulus of this action full of promise for the world. We feel that, thanks to American initiative, we are on the threshold of accomplishment in the most important endeavor of the human race to lift itself out of the savagery of strife into the domain of law, breathing the spirit of amity and justice.

The Governing Board of the Pan American Union, in the same meeting held on the second of March, last year (1925), promptly adopted the resolution which we will here transcribe:

Whereas the Governing Board of the Pan American Union by resolution of January 2, 1924, suggested to the executive committee of the American Institute of International Law the desirability of holding a session of the Institute in 1924 in order that the results of the deliberations of the Institute may be submitted to the Commission of Jurists at its meeting at Rio de Janeiro in 1925; and

Whereas the American Institute of International Law has submitted to the Governing Board of the Pan American Union the results of its labors, Be it

Resolved, to send to the respective governments, members of the Pan American Union, through their representatives on the Governing Board, the projects of conventions on the codification of international law submitted to the Board, in order that they may be submitted to the Commission of Jurists to be held at Rio de Janeiro in 1925; and be it

Further resolved, that the chairman of the Governing Board express to the American Institute of International Law the appreciation of the Board for its valuable contribution to the codification of international law.

And on the same day, in order to continue actively along the path ventured upon with success, the Governing Board of the Union voted also an additional resolution, the text of which is as follows:

Whereas the American Institute of International Law has performed a most important service in preparing a series of projects covering public international law of peace, Be it

Resolved by the Governing Board of the Pan American Union, that the executive committee of the American Institute of International Law be requested to prepare a project or series of projects embodying the principles and rules of private international law for the consideration of the Commission of Jurists.

A commission of which three most able members of the Institute, Señores Rodrigo Octavio, of Brazil, José Matos, of Guatemala, and Eduardo Sarmiento Laspiur, of the Argentine Republic, formed a part, and including also the speaker, were assigned the duty of preparing that draft of a Code of Private International Law. In order to facilitate the work, I drew up and published a project which was accepted with slight changes in a meeting attended by Señores Octavio and Matos at which, to the great regret of all, Sr. Sarmiento Laspiur was not able to be present, and it was sent to the President of the American Institute, Mr. James Brown Scott, and presented by your able and zealous Secretary of State to the Pan American Union, which in turn has submitted it to the governments which it represents.

In preparing this draft, which contains in addition to basic principles, the civil, mercantile, penal, and international procedural law, the first question which seemed to be encountered was that of domicile and of nationality as determining factors of laws of the person or of internal public order. This has been the battle-field of writers and of official and private assemblies, and no one fails to recognize it as a most important difficulty. A mathematical consideration, however, tends to reduce this obstacle to its true proportions.

The completed draft of the code contains 435 articles, and it may be shown that a great majority of them, in fact 380, have no relation whatsoever to the question of nationality and of domicile and may be accepted and applied whichever criterion as between the two mentioned may be preferred and adopted.

As to the rest, which are an obvious minority, there must be found a formula which protects national traditions, independence and sensibilities, and permits, nevertheless, the application and the victory of international codification on these points.

Among these formulas of compromise the best seems to be one suggested in the Conference of The Hague and modified by a competent South American writer. According to this formula, it would either be stated in the code that each state will apply its own national law without prejudice to the acceptance of that of domicile for the citizens of those countries whose laws prescribe it, or that each state accepts the law of domicile without prejudice to the acceptance of a different law if the national laws of the foreigner's country so prescribe. This formula is good when considered in connection with the national codification of private international law; for then, considered from the point of view of the national code, it is efficient and of practical importance. But when one comes to an international code enforced by treaties between various nations, this formula has to be put aside, or else it will turn out for some of them to be but an illusion or deception. In fact, if ten states, some of which define personal status by nationality and others by domicile, sign a treaty stating that they all accept one of these principles, either that of nationality or that of domicile, in determining legal relations of a personal character, it would be useless to make an exception in favor of the opposite principle; for from the time the treaty becomes law, the latter principle ceases to have force with any of the contracting parties and the exception serves no practical purpose.

This brings us necessarily to another solution, which leaves to every country the sovereign right to regulate as it pleases the personal status of its citizens, within its borders and in foreign countries, but obliges every country to respect the same sovereign right and the same exercise of power in other countries. The formula consists simply in declaring, as is done in our draft, that each state will apply to the citizens of other nations the laws of an internal public nature, of domicile or of nationality, according to the system adopted by the state to which such aliens belong. It would not be correct to say that by this method every individual alien is to be ruled under a different principle, according to that adopted by his own nation; for, even subjecting all to the principle of domicile, mere temporary residents domiciled in a foreign country will also be ruled by different principles, according to their domicile. And this variation in law is but the acknowledgment of the complexity of human life, to the different problems of which the same solutions may not be applied.

There might be repeated, as applying to our formula, that which the able delegate from Uruguay, Dr. Pedro José Varela, said in the Commission of Jurists:

> According to this rule each country, within the narrow limits of its sovereign action, keeps the right which legitimately belongs to it, of making its own laws.

And it is important to add that no nation is obliged to change radically its internal legal system, although it gains for its own citizens that which it grants to those of each of the other contracting republics.

Perhaps objection may be made to too great daring in a project which codifies at one time for America all private international law; but it must be remembered that between the two systems,—that of concluding the matter as an entirety and that of dealing with it piecemeal by sections or chapters, the first has more than one obvious advantage. When the professors or the diplomats give us the task of making a selection of the matters in which it appears most easy to reach an agreement, we very frequently forget where accord already exists and we inevitably think of other things in which the agreement and decision may have an immediate practical and perhaps one-sided benefit in which all do not share to an equal degree. But if, on the other hand, with a little order and system we resolve to draw a full picture of these subjects, two things astonish us in bringing to a completion our earnest desire; the first is the great number of rules in which we are all in conformity and which this good method obligates us to put into writing with certainty and precision; the second is the small number of solutions among them all which raise difficulties or doubts among those who examine or give an opinion on the work as a whole. And this last is very important because it quickly shows that the American world is admirably prepared by its legal, political and social culture, to enjoy the benefits of a single law applying to the relations between individuals of different nationalities and consequently for the determination, economic and personal, of the spatial limits of the respective legal systems enforced therein. The success of the Congress of Montevideo in 1888 and 1889 is an omen and a guarantee.

It is possible, doubtless, that a particular rule may not obtain a unanimous vote because of the obstacle of some national law, and it is necessary that such relative and partial difficulty should not lead to the ruin of the entire work. For this reason the draft of the treaty which would place the code in force, and which also has been drawn up and presented to the Pan American Union, provides in its third article that which we quote hereunder:

> Each of the contracting Republics on ratifying the present convention, may declare that its acceptance of one or several of the articles of the Annexed Code is reserved and the dispositions to which such reservation refers shall not bind it.

In this situation, sufficiently advanced, the work over the codification of international law, public and private, will come before the International

Commission of American Jurists, a meeting of which in Rio de Janeiro has recently been fixed for the month of April of next year, 1927. A good number of Republics, which already constitute a majority, have designated their representatives who in the double capacity of jurists and of delegates of their governments, will study and certainly will modify, so far as necessary, all the projects. As they have been printed and circulated two years before the meeting, they are already being subjected to detailed and adequate study and the work of cleansing them of defects and of preparing a final report will be easy. Certainly their authors, and the American Institute which has fostered them, will view with true satisfaction whatever may improve them and thereby facilitate their adoption and success.

The happy innovation of the Pan American Union which we have incidentally mentioned before, that each Republic send two delegates, will now result in greatly facilitating the work and in saving considerable time. It has been suggested that the Commission might well divide itself into two subcommissions, one for public international law and the other for private international law, on each of which one of the national delegates would serve, all the nations of America thus being represented in the discussions and in the vote. The work in both branches would be along parallel lines without impeding or delaying each other, and two or three meetings of the Commission in full session would then be sufficient happily to conclude the matter and to give solemn official sanction thereto.

Thereafter, the Sixth International Conference, which is to assemble in the capital of the Republic of Cuba on January 16, 1928, will have its word, and after it the Governments of our several Republics. Each of them will have abundant time to study these questions, clearing them up and observing the trend of general opinion.

Of one I can say, with great personal pleasure, that he has not lost sight of this important duty. His Excellency, the President of Cuba, General Gerardo Machado, in whose upright administration we Cubans feel not only satisfaction, but pride, has generously authorized me to say to you in his name that his Government looks with peculiar gratification upon the efforts for the codification of international law as a pressing necessity and an inestimable benefit to the American World and that it is disposed to lend them its coöperation and assistance.

Assuredly all the public authorities of the other twenty brother nations will act in the same way. Very speedily, then, that most beautiful conception of the great Liberator, Bolivar, will be a reality,—an example and a stimulus to all humanity. "The New World," he wrote, prophetically, more than a century ago, "ought to be constituted of nations free and independent, united among themselves by a body of common laws which determine their external relations."

The PRESIDENT. I must express to you, Dr. de Bustamante, upon behalf of the Society, our deep appreciation of the gracious message which

you have brought to us from the President of Cuba, and our sense of obligation to you for the very able and instructive address that you have delivered. May I say also on behalf of the Society that, as you leave shortly to take up your important work on the Permanent Court of International Justice, you may be assured that you will carry with you our highest esteem and our deep feeling of indebtedness, for the eminently practical service you have rendered to the cause of peace, both here and abroad. We cannot fail to have a certain pride in what has been achieved in this hemisphere in a very difficult, but necessary, undertaking to codify, to set forth in simple fashion, if possible, the agreement of the nations as to the principles that shall govern their relations, and also in that effort to develop the application of those principles and to define new statements of principle which will aid in preserving peace and in regulating our mutual activities.

But while we have had that interest and pride in what has been achieved, in which Dr. Bustamante has had such an honorable and important part, we are also interested, deeply interested, in the work that is going on abroad under the auspices of the League of Nations. The next speaker is one of ourselves. He is not a stranger to us. He is a citizen of our country, but he has made himself, as well, a citizen of the world. It was very natural that he should be called, as representing American talent and learning, to assist in this undertaking of the League. We shall be glad to hear from him as to what has been done and the processes which are going on in connection with this important work. Mr. Wickersham.

THE PROGRESS OF CODIFICATION UNDER THE AUSPICES OF THE LEAGUE OF NATIONS

By George W. Wickersham

Of the League of Nations Committee of Experts

The members of this Society who attended the last annual meeting, or who have read the record of its proceedings, will recall that the Executive Committee made a report to the Council concerning certain communications received from the Director of the Legal Section of the Secretariat of the League of Nations, embodying a request to consider what are the problems of international law, the solution of which by international agreement would seem to be presently most desirable and most easily realized. The Executive Committee reported in favor of coöperation with the Committee of Experts referred to in those communications. The report was approved, its recommendations adopted by the Council, and a committee was appointed for the purpose of drafting a report to be submitted to the Council for its consideration, with a view to its later submission on behalf of the Society to the Committee of Experts. It is a matter of regret that the report of this committee was not received before the second session of the Committee of

Experts which was held at Geneva in the month of January, 1926. That body, however, had anticipated that the various learned societies included in the category of "the most authoritative organizations which have devoted themselves to the study of international law," with whom it had been instructed to consult, were not so organized as to be able to deal promptly with such inquiries, and, therefore, itself had adopted at its first meeting held in April, 1925, a provisional list of a dozen subjects for study and report to the full Committee at its next session. The initial duty laid upon the Committee by the resolution of the Assembly was:

> (1) To prepare a provisional list of the subjects of international law, the regulation of which by international agreement would seem to be most desirable and realizable at the present moment.

This list it was required to communicate through the Secretariat to the governments of states, whether members of the League of Nations or not, for their opinion, to examine the replies received, and then to report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed, with a view to preparing eventually for conferences for their solution.

The result of the deliberations of the Committee between January 9th and 30th, 1926, was the adoption of a series of questionnaires relating to the following subjects, *viz.:* (1) Nationality; (2) territorial waters; (3) diplomatic privileges and immunities; (4) responsibility of states in respect of injury caused in their territory to the person or property of foreigners; (5) procedure of international conferences, and procedure for the conclusion and drafting of treaties; (6) piracy; (7) exploitation of the products of the sea. The Committee further reported that it had examined other matters dealt with in reports, namely: (1) on extradition; and (2) on the criminal competence of states in respect of offenses committed outside their territory, which subjects, after examination, the Committee had decided not to include in the provisional list to be submitted to the governments as subjects ripe for present consideration, but which reports it considered desirable to refer to the governments for their information. The Committee further advised the governments that it had presented a special report to the Council of the League of Nations on the question of the legal status of government ships employed in commerce, while the question of the application in international law of the conception of prescription, had been placed with other questions upon the agenda for its next session.

In addition to adopting the reports above mentioned, the Committee, in order to employ as usefully as possible the time which necessarily must elapse before answers to these communications may reasonably be expected, agreed upon a list of additional subjects to be studied by various subcommittees appointed for the purpose, namely, whether it is possible to establish by way of international convention, (1) dispositions concerning the

communication of judicial and extra-judicial proceedings in penal matters, as well as letters rogatory in criminal proceedings; (2) dispositions concerning the juridical status of private international associations not for profit, as well as private international foundations; (3) the judicial situation and the functions of consuls; (4) the determination, in the absence of special provisions, of the effects of the most-favored-nation clause in treaties; (5) international rules concerning the competence of courts regarding foreign states, and especially regarding states engaged in commercial transactions; (6) recognition of the juridical personality of foreign commercial associations; (7) international rules of conflict of laws concerning contracts for the sale of merchandise. The Committee also constituted subcommittees to consider (8) whether or not there are questions relative to the conflict of laws relating to domicile, the conventional solution of which might be considered without conflict with obstacles of a political nature; what those questions are, and what solutions they might receive; (9) whether it is desirable to revise the classification of diplomatic agents as established by the Congresses of Vienna and Aix-la-Chapelle, and if so, in what manner such revision should be stated, and (10) whether it is possible without conflict with obstacles of a political or economic nature to formulate by way of convention international rules concerning the nationality of commercial associations, as well as the determination of the state which should have the right to extend diplomatic protection to them.

The resolution of the Assembly of the League of Nations adopted September 22, 1924, instructed the Council to convene for the study of the subjects and the method of approaching what may be, somewhat inaccurately, described as the Codification of International Law, "a Committee of Experts, not merely possessing individually the required qualifications, but also as a body representing the main forms of civilization and the principal legal systems of the world." The Council, pursuant to this requirement, selected seventeen gentlemen from as many different countries. One of these was an East Indian, an expert in Mahommedan law, who, however, was unable to serve, and while another was designated in his place, he, too, has been unable to attend any meeting of the Committee. Of the sixteen remaining members, Mr. Botella, of Spain, was unable to attend a meeting. At the first meeting of the Committee all of the other fifteen members were present, being respectively nationals of Sweden, Italy, Great Britain, France, Salvador, The Netherlands, Portugal, Czechoslovakia, Japan, Poland, Germany, The Argentine, Belgium, China and the United States of America. Professor Charles de Visscher of Belgium was unfortunately prevented by illness from attending the second meeting and Dr. Wang Chung Hui, of China, was detained in his country; so that only thirteen members of the Committee were present during the sessions and, as a matter of fact, no more than twelve were present at any one time.

Almost from the beginning of their sessions, the Committee developed

what I may call a corporate spirit, and while, naturally, there were many differences of opinion between the members, there was the most cordial coöperation at all times in efforts to reach practical results, and where differences in viewpoint arising from apparently irreconcilable differences of national jurisprudence or policy were presented, the Committee frankly recognized them as facts which had to be reckoned with and for the time being, at least, did not seek to solve the apparently insoluble. These discussions, however, brought out very clearly the difficulties which must attend the effort to agree upon a general rule applicable to all civilized nations, in fields where, while there is most need of one commonly accepted standard, as a matter of fact there seems to be the greatest divergence of fundamental principles. Certainly the first step towards the desired accomplishment will be the clear presentation of the present differences in national theory or policy, with an explanation of the reasons for and the objections to each, followed by suggestions as to the apparently most possible means of reconciliation. This work can be done preliminarily by such a body as the Committee on the Progressive Codification of International Law, in preparation for the consideration of an official conference of representatives of the Powers, which eventually must be created. For it should be frankly recognized that the Codification of international law, in the sense in which it is now being practically employed, implies legislation by the nations; the establishment by common consent of conventional rules of law; and while this process is at work in its field, the Permanent Court of International Justice, by the customary method of judicial action, will be making more clear and authoritative the principles of the existing and generally accepted law of nations.

A discussion of the first report presented to the Committee of Experts made it perfectly obvious that it was impracticable within the time available by the Committee, to reach an agreement respecting all, or perhaps even a majority of the conclusions of the *rapporteur* of a particular subcommittee, still less to attempt agreement upon the formulation of the proposed international convention which each *rapporteur* annexed to the report of his subcommittee. The Committee recognized that its immediate task was simply agreement upon a provisional list of subjects which it was desirable and presently feasible to regulate by international agreement, and it therefore concluded that after considering a report and discussing its provisions, it should decide whether or not the subject dealt with fell within the abovementioned category. It was, however, determined to transmit to the governments the report or reports of the subcommittees, not as representing the conclusions of the full Committee, but as material upon consideration of which it had agreed that the subject of the report was one of those which it was practicable to embody in international agreement. This method seemed to the Committee the best and most practical way to make progress in carrying out the mandate laid upon it. While reaching this conclusion, the Committee, nevertheless, devoted a very considerable time to the discussion

of the various reports, and where it was possible, without too much delay, to adopt or to bring about a modification of the recommendations of the report to conform to the views of at least a majority of the members. As a matter of fact, the Committee spent many days in such discussion. Too much credit for the practical results reached cannot be given to the intelligent, skilled and tactful direction of the deliberations of the Committee by its Chairman, His Excellency M. Hammarskjöld, of Sweden.

In view of the program adopted for the round table conference of this Society held today, it may be of interest to point out that the first report discussed by the Committee, and that to which it devoted probably more time than to any other, was upon the subject of Nationality. Dr. S. Rundstein, of Poland, previous to the meeting had prepared and circulated a report, which was approved by M. de Magalhaes, of Portugal, and respecting which Dr. Schücking, of Germany, had submitted certain observations, which produced a supplemental report from the *rapporteur* Dr. Rundstein. In common with most of the *rapporteurs*, Dr. Rundstein attached to his report a preliminary draft of a convention in seventeen articles dealing with certain conflicts of laws regarding nationality. As a result of the discussion in the Committee, Dr. Rundstein revised this draft and reduced the number of articles to thirteen. Probably no subject at the present time calls more insistently for general international agreement than that of nationality. The program for the round table conference today involves a recognition of that fact. Much time was devoted at the last meeting of this Society to a discussion of addresses by Mr. Hackworth and Mr. Flournoy, of the Department of State, as well as by Dr. Taraknath Das and others. I must express my entire concurrence with the observation of Mr. Flournoy in the course of his remarks on that occasion, that one objection to the proposed Pan American Convention on this subject, which seems to overshadow all others, is the fact that it is applicable only to the countries of the Western Hemisphere, and that, instead of attempting to compose the conflicts between the nationality laws of European countries, on the one hand, and American countries, on the other, it would serve to accentuate and make permanent those conflicts. I also am entirely in accord with him, in his statement that,

> While there may be some subjects with regard to which it may be reasonable to adopt international conventions limited to the countries of the Western Hemisphere, it is not believed that nationality is one of them. There is at the present time much more intercourse between the United States and European countries than there is between the United States and countries of Latin America and consequently more citizens of the United States live in Europe than in Latin America. Furthermore, it would be inconvenient, to say the least, to have one law govern the status of a person born in Europe of American parents, while an entirely different law governs the status of a child born in Latin America of American parents.

By the first article proposed by Dr. Rundstein, the states, while recognizing the general principle that acquisition and loss of nationality are governed by the internal legislation of each country, would undertake not to afford diplomatic protection and not to intervene on behalf of their nationals, if the latter were simultaneously considered to be nationals of the state on which the claim was made, on grounds other than mere residence in the country of the latter state. This article, Dr. Rundstein pointed out, was modeled on Article 7 of the Project (No. 16) prepared by the American Institute of International Law for the Governing Board of the Pan American Union. It was, however, objected in the Committee that the proposed article involved a contradiction, in that, while recognizing the general principle that acquisition and loss of nationality are governed by the internal legislation of each country, in the next breath the states were pledged to undertake to limit and restrict the effect of that legislation by agreeing not to afford protection to their nationals, if the latter were considered by another country to be its nationals on grounds other than mere residence in the country. Dr. Rundstein thereupon modified this first article to read as follows:

> The high contracting parties undertake not to afford diplomatic protection and not to intervene on behalf of their nationals, if the latter are simultaneously considered as its nationals from the moment of their birth, by the law of the state on which the claim is made.

Naturally, the report of Dr. Rundstein dealt with dual and plural nationality, statelessness, the *jus soli* and the *jus sanguinis*. Dr. Rundstein most frankly recognized the difficulty, if not the impossibility, of reconciling the laws of a country in which the *jus soli* is recognized with those of one in which the *jus sanguinis* prevails. Indeed, he said:

> It cannot be even said that the simple and elementary principle that "each individual must have a definite nationality" is a generally recognized rule of international law, since the lack of any nationality (*heimatlosat*) has become very frequent and constitutes a serious problem in international life, arising as it does out of conflicts of laws which are often complicated and sometimes inextricable.

The United States, in the enactment of the Cable Law of September 22, 1922 (42 U. S. Stats. 1021), whereby a woman national of a foreign state who marries an American citizen does not, by reason of the fact of marriage, acquire his citizenship, although by the law of her own country she loses hers, has made a high contribution to the complexity of rules of nationality. It does seem quite extraordinary that one of the first products of the newly conferred franchise of women, should have been the enactment of such a measure as this, contributing, as it does, powerfully towards the destruction of that unity of the marriage relation which for centuries has been considered the foundation stone of the state. Marriage exists, not merely as a conventional regulation of social intercourse between two individuals, but for the purpose of the foundation and regulation of the family, the unit of every

civilized state, and for the protection of children, upon whom depends the future of the state. The most serious and disquieting development of our time is the conversion of marriage into a casual partnership between men and women in absolute disregard of its effect upon the offspring of the union. To this destruction of the permanency of marriage this Congressional legislation has contributed in no slight degree.

Professor Garner, at the last meeting of this Society, dwelt upon the chaos into which the Cable Act has thrown the whole matter of citizenship. He said:

> It has put the legislation of the United States in conflict with the legislation practically of the rest of the world. It has created a large body of stateless persons. We all sympathize with the point of view of the women who had that law enacted, yet I venture to say they never foresaw the injustice that has been done to members of their own sex and to the male sex.

As a matter of fact, I believe the only other countries which have adopted the principles of that law are Soviet Russia, the Argentine, Chile and Uruguay.

Article 2 of Dr. Rundstein's draft proposed that a woman who did not acquire through marriage the nationality of her husband, and who at the same time was regarded by the law of her country of origin as having lost her nationality through marriage, should, nevertheless, be entitled to a passport and diplomatic protection of the state to which her husband belonged. This article, Mr. Suarez, the Argentine delegate, declared raised a question, the importance and delicacy of which could not be overestimated. He said that having consulted ten governments of Latin America, he had arrived at the conclusion that there must be an effort made to reach an agreement which could more or less settle conflicts of nationality with Europe. He said that the countries of Europe and Latin America would certainly be disposed to make reciprocal concessions, as the present state of the question gave rise to the greatest difficulties. He cited, for example, the case of a Frenchman, born in the Argentine, returning to the Argentine after having been wounded three times while in the French Army, where he had acquired the grade of captain, and who upon his arrival in the Argentine was arrested as an Argentine deserter. Professor Diena, of Italy, remarked that difficulties of the same character arose between European states; that in Italy every son of an Italian is regarded as Italian, wherever born, while in France the son of a foreigner born there was, nevertheless, regarded as French, and he referred to cases that he had known of where young men born in France of Italian parents, had served their term in the Italian army, and on return to France had been imprisoned as deserters, adding that while such cases had been adjusted by agreements more or less outside the law during the war, they presented constant difficulties between European countries. Various suggestions were discussed as to how a wife who found herself in the unfor-

tunate position of statelessness as a result of the American law might be protected by some sort of qualified passport, but no conclusion was reached. Dr. Rundstein, in his modified draft of convention, proposed that a married woman should lose her original nationality by virtue of marriage only if at the moment of marriage she is regarded by the law of the state to which her husband belongs as having acquired his nationality, and that a woman who does not acquire through marriage the nationality of her husband and who, at the same time is regarded by the law of the country of her origin as having lost her nationality through marriage, should, nevertheless, be entitled to a passport from the state of which her husband is a national on the same footing as her husband. In support of this, he cited a case which had occurred in Poland. An American architect who had come to Poland on the invitation of the municipality of a town, married a German, who thereby lost her German nationality, without acquiring American nationality. As she had no passport, the local authorities refused to grant her a *permis de sèjour*. To settle the difficulty, the United States Consul gave the lady a certificate stating that, without having acquired the nationality of the United States, she had married an American citizen, which the local authorities regarded as sufficient to grant her a *permis de sèjour*. Based on that procedure, he proposed to substitute for the word "passport," the words "identity certificate."

The subject of nationality is being increasingly complicated. By the law of the Argentine, it seems any one who purchases land in that country becomes a citizen of the Argentine, and recently it has been stated in the press that Mexico proposes to adopt a similar law. Many other countries besides Italy do not recognize the right of expatriation, and consider as their own the children of their nationals born in foreign lands, even although by the law of those countries the child becomes a national of the country where born. If there is in the whole field of international law one matter which should be regulated by international agreement, it is this subject of nationality. It is earnestly to be hoped that the Department of State will concur with the Committee on the Progressive Codification of International Law that this is a subject which it is not only desirable, but presently realizable, to be embodied in international agreement.

It is, of course, impracticable within the limits of this occasion to review in detail the discussion of the various other reports of the subcommittees upon the subjects above mentioned which have been reported to the governments as ripe for international agreement. Yet a few words may be said concerning one or two others.

Perhaps one of the most interesting of these reports was that on territorial waters, prepared by Dr. Schücking, with the comments of Mr. Magalhaes and the present speaker. Like Dr. Rundstein, Professor Schücking added to his report a draft convention in fourteen articles. As a result of the discussion between him and the present speaker, the comments of Mr. de

Magalhaes and the discussion in the full Committee, Dr. Schücking very considerably modified this draft. The subjects covered by the proposed convention embraced (1) the character of the rights of the riparian state over territorial waters; (2) the extent of the territorial waters over which a state exercises sovereignty or other rights; (3) national rights over bays; (4) concerning islands; (5) regarding straits; (6) the right of peaceful passage by foreign vessels through territorial waters; (7) jurisdiction of the riparian state over foreign vessels passing through territorial waters; (8) nature of regulations which a riparian state may impose and the right of "hot pursuit" of foreign vessels; (9) right of the territorial state over the riches of the sea and over the subsoil under the sea; (10) rights of foreign warships in territorial waters; (11) jurisdiction of the riparian state over foreign merchant vessels in her ports. In his original report, Dr. Schücking proposed to extend the jurisdiction of a state over the adjacent waters of the sea to a distance of six miles. In the recent treaties between the United States and Great Britain, Germany and The Netherlands, respectively, concerning the prevention of violation of the laws of the United States against the importation of intoxicating liquors, the high contracting parties declared it to be "their firm intention to uphold the principle that three marine miles extending from the coast line outwards and measured from low water mark constitute the proper limits of territorial waters." In view of these agreements, Dr. Schücking modified the recommendations of his convention to three miles as the width of the territorial waters.

The regulation of rights which a state may exercise in the waters of the seas adjacent to its coast, but at a greater distance than three miles, was the subject of much discussion, both in the reports, the comments upon them, and in the discussion of the full Committee,—rights such as those which by long continued usage have been exercised by the United States, with the acquiescence of other nations, to board incoming vessels within four leagues of the coast. Such also are the rights created by the recent treaties respecting the importation of intoxicating liquors, whereby, even in the case of such Powers as Italy, Norway, Sweden, and Denmark, which have not recognized three marine miles as the limit of the territorial sea, and, therefore, respectively have retained their rights and claims without prejudice by reason of provisions in the treaties, it is, nevertheless, agreed that vessels of the United States may visit, search and arrest vessels flying the flag of the other party to the treaty, suspected of a violation or intention to violate the laws of the United States concerning the importation of liquors, within a distance from the coast of the United States which may be traversed in one hour by the vessels suspected of the offense. In other words, without extending the limit of the territorial waters, these nations have specifically agreed to the exercise by the United States Government of the right of visitation, search and seizure for the prevention of violation of her laws in waters adjacent to her coast, beyond the limits of her territorial sea. It

was therefore contended by members of the Committee that such rights as these should be recognized and dealt with as things apart from and outside the limits of the territorial sea, without attempting to extend those limits to the entire distance within which such rights were exercisable. Professor Schücking, while agreeing to this general contention, proposed to extend this principle by a provision that "beyond the zone of sovereignty, states may exercise administrative rights on the ground either of custom or of vital interest. There are included the rights of jurisdiction necessary for their protection."

This seemed to the present speaker to go beyond anything which has heretofore been agreed to or even acquiesced in. In his opinion, while these rights are founded upon the broad principle of the defence of national interests, it cannot be conceded that a state, independently of long established and accepted custom or treaty, has the right to exercise any authority it may see fit to exert in the waters beyond its territorial sea, upon the ground that it is necessary to its protection. But the subject assuredly is one which should be dealt with by international agreement, and while it may be difficult to bring all the nations into accord as to the width of the territorial sea, in view of the fact that many nations claim jurisdiction over a greater space than three miles, the different claims running from five to ten and even twelve miles, yet without accord upon a common delimitation of territorial waters, a general agreement may be feasible concerning other matters affecting waters adjacent to the national coast which now are uncertain or in dispute.

A very interesting report was that prepared by Mr. Guerrero, of Salvador, with the concurrence of Dr. Wang Chung Hui, on the subject of the responsibility of states, which the reporter discussed under two heads; first, whether, and if so, in what cases, states may be held responsible for damage done in their territory to the person or property of foreigners, and second, whether, and if so, in what terms, it would be possible to frame an international convention whereby facts which might involve the responsibility of states could be established and prohibiting in such cases recourse to measures of coercion until all possible means of pacific settlement should have been exhausted.

In discussing the first proposition and reaching the conclusion that there are cases in which a state may be held responsible for damage done in its territory to the person or property of foreigners, the reporter reviewed the juridical nature of international relations, and asserted that under the modern conception of international law, as dominating the law of individual states and governing the relations of the whole family of peoples, in a manner so undoubtedly binding that no state can disregard it, although the binding character of international law is founded on the free consent of states thereto—the consent of all states and not merely the consent of some—that as regards the protection of foreigners

> customary law lays down certain rules which clearly express the definite law of states regarding the rights which they agree to accord to foreigners, the manner in which foreigners are to be treated, the method of determining the state which is responsible for their protection and the means of ensuring such protection.

He pointed out, moreover, that

> protection involves certain positive acts that can only be performed by the state possessing the sovereignty. Any dual sovereignty would be inconceivable, for one sovereignty would exclude the other.

Discussing this liability of the state, he emphasized the fact that what is required of the state is the fulfillment of an international *duty*. How it does so, matters little; but, he added,

> although the state is perfectly free to select what methods it prefers for the protection of foreigners within its territory, it is not free to restrict its responsibility to cases of violation of the arrangements which it has made. Responsibility may be incurred by failure to adopt methods which should have been adopted or by the inadequacy of the methods actually adopted.

In a discussion over this clause in the Committee, it was recognized that it is not always a sufficient answer by the government of a state to a complaint by another Power of its failure to furnish due protection to nationals of the latter Power, or redress to them for damage done to their person or property, that its courts are open to them, where, as a matter of fact, the conception of the jurisprudence and the organization and administration of the courts of the state complained of fall below the accepted standards of civilized Powers, and the remedy offered is fatuous or illusory. The report necessarily dwelt upon the difficulties presented by the case of composite states and the question of the responsibility of a central Power which represents the State in its international relations, a difficulty which will readily be recognized by Americans.

In discussing in what cases a state may be held responsible for damage done in its territory to the person or property of foreigners, the reporter discussed the subjects of political crimes committed against foreigners in the territory of the state, the illegal acts of officials of the state, the acts of private persons, acts performed in the exercise of judicial functions and damages caused to foreigners in cases of riot and civil war. Upon the second question, viz.: the establishment of facts and the prohibition of coercive measures until measures of conciliation are exhausted; the *rapporteur* summarized the advantage of international commissions of inquiry for the ascertainment of facts which may involve the responsibility of states, and recommended their adoption.

The conclusions of the report, which are embodied in the form of paragraphs for inclusion in international treaty, were considerably modified as the result of discussion in the Committee. Without undertaking to rehearse

these conclusions at this place, it may be of interest to note that in them it is declared that a state is responsible for damage incurred by a foreigner and attributable to an act contrary to international law, or to the omission of an act which the state is bound to perform under international law, and inflicted by an official within the limits of his competence, subject always to the following conditions:

> (a) If the right which has been infringed and which is recognized as belonging to the state of which the injured foreigner is a national is a positive right established by a treaty between the two states or by the customary law;
>
> (b) If the injury suffered does not arise from an act performed by the official for the defense of the rights of the state, except in the case of the existence of contrary treaty stipulations:

And it was added:

> The state on whose behalf the official has acted cannot escape the responsibility by pleading the inadequacy of its laws.

The report further declared that the state is not responsible for the damage suffered by a foreigner as a result of acts contrary to international law, if such damage is caused by an official outside his competence as defined by the national laws, except in the following cases:

(a) If the government, having been informed that the official is preparing to commit an illegal act against a foreigner, does not take timely steps to prevent such act;

(b) If when the act has been committed, the government does not with all due speed take such disciplinary methods and inflict such penalties on the said official as the laws of the country provide;

(c) If there are no means of legal recourse available to the foreigner against an offending official, or if the municipal courts fail to proceed with an action brought by the injured foreigner under the national laws.

The conclusions of this report, as I have already mentioned, were not adopted by the Committee of Experts as their conclusions, but were merely transmitted as showing the importance and the feasibility of dealing with the subject by international agreement.

A few words should be added concerning the special reports transmitted to the governments, without recommendation and merely for their information. The first of these is a report dealing with the subject of extradition. A sub-committee consisting of Professor Brierly, of All Souls College, Oxford, England, and M. de Visscher, of Belgium, was appointed to consider "whether there are problems connected with extradition which it could be desirable to regulate by way of general convention, and if so, what those problems are and what solution should be given to them." Mr. Brierly submitted to the Committee a report which was accompanied by certain written observations on the part of M. de Visscher. Mr. Brierly reported that on a large number of questions connected with extradition, there already ex-

isted practical uniformity in the practice of states, and in certain others the differences which exist are not founded on any seriously divergent policies, and might be capable of reconciliation, but undoubtedly there are still other questions upon which states appear to hold strongly opposed views, the existence of which renders a single comprehensive convention regulating the whole practice of extradition for all states unlikely of achievement. Whether a general convention dealing with part of the subject of extradition would be desirable, on the assumption that one dealing with the whole of the subject is impracticable, seemed to the *rapporteur* to be a matter for serious consideration. He said:

> It would be open to the obvious criticism that it added one more to the number of extradition treaties which it is the object of a codifying operation to reduce, since a partial general convention would, of course, require to be supplemented by special bilateral conventions on the points on which general agreement had proved impossible; but, on the other hand, certain of the differences which at present appear to be formidable obstacles might, on a general discussion, prove less serious.

And he added:

> It is perhaps unnecessary for us to remind the Committee that extradition between states calls for a certain degree of mutual confidence in each other's judicial institutions, and that a general convention on the subject is only possible on the assumption that each state is willing to accord equal treatment to every other.

In the discussion in the Committee, further difficulties arose from the fact that some states, Italy, for example, absolutely refuse to extradite their own nationals at the request of the governments of other countries in which they may have committed offenses against their laws.

After careful consideration of the report and a discussion of the questions involved, the Committee agreed that there are certain questions connected with extradition which are susceptible of being dealt with by way of a general international convention; such questions being the following:

(1) The question whether and under what conditions a third state ought to allow a person who is being extradited to be transported across its territory.

(2) The question which of two states both requesting extradition of a national of a third state ought to have priority over the other.

(3) Questions which arise as to the extent of the restrictions of the right of trying an extradited person for an offense other than that for which he was extradited, and on a state's right to extradite to a third state a person who has been delivered to it by way of extradition.

(4) The question as to the right of adjourning extradition when the person in question has been charged or convicted, in the country where he is, of another crime.

(5) The question of confirming the generally recognized rule by which the expenses of extradition should be entirely borne by the claimant state.

The discussion in the Committee of the other questions relating to extradition mentioned in the report led it to the conclusion that, although their solution by international agreement appeared very desirable, the difficulties in the way were too great for such solution to be realizable in the near future. Under these circumstances, the Committee reported that, while taking into full account the reasons which, in the opinion of many important authorities, tell in favor of a general international regulation of extradition, it had refrained from including in its provisional list even the questions which in themselves were found susceptible of being treated in a convention. Nevertheless, they decided to communicate the report and the observations of M. de Visscher to the governments in order to give them a clearer view of the position.

One of the matters referred to a subcommittee for study was an inquiry into the legal status of government ships employed in commerce, with a view to the solution by way of convention of the problems raised thereby. The subcommittee, composed of Mr. de Magalhaes, as *rapporteur*, and Mr. Brierly, submitted to the Committee a report setting out the reasons in support of its conclusion that this subject was one the regulation of which by international agreement is at the present moment desirable and realizable. The Committee, while agreeing to the conclusions of the subcommittee, had its attention called to the fact that this subject already had been studied at two international conferences called by the International Maritime Committee, and held respectively at Guttenberg and Genoa, and that a draft convention had been submitted to the Government of Belgium, with the request that that government should call a diplomatic conference in order to prepare a convention for adoption and signature by the states, and that the Belgian Government at the moment of the deliberations of the Committee had this request under examination. Considering, therefore, that if the Belgian Government should accede to this request, the communication of this subject to the various governments, in accordance with the Assembly's resolution of September 22, 1924, might appear superfluous, the Committee resolved to transmit its subcommittee's report to the Council of the League of Nations with an expression of the opinion of the Committee that the subject is one which it is desirable and presently realizable to regulate by international agreement, either in the manner proposed by the International Maritime Committee, or if that committee's initiative should remain without effect, in such other manner as the Council might deem appropriate.

The president of this Society at its last annual meeting pointed out that we should be under no misapprehension as to the conditions in which the task of bringing the nations to a spirit of reasonableness in dealing with conflicts of interest shall be accomplished. It must be with the consent of nations, a consent to be obtained from governments faced with political

exigencies, and the machinery best adapted to the purpose he said was that of international conference, conferences of all civilized nations, who, through their governments, recognize the obligations of international law. It is in the preparation for such a conference that the Committee appointed by the League of Nations was directed to work. After the consideration by the governments of the provisional list of subjects referred to them, the Committee is directed to report to the Council on the procedure to be followed, with a view to preparing eventually for conferences for the solution of the questions which it seems to be most desirable and realizable to deal with at the present moment. The resolution presupposes coöperation on the part of the various foreign offices in this preliminary work. It is the earnest hope of the Committee that they, and particularly our own State Department, may give consideration to the communications forwarded to them, and aid the Committee of Experts with helpful suggestions, or at least by a helpful attitude towards the problem presented. With such an attitude the labors of the future official conferences will be greatly facilitated, the prospects of agreement enhanced, and the great object of clarifying and extending the rule of law over all members of the Family of Nations brought nearer to achievement.

The PRESIDENT. We are grateful indeed to Mr. Wickersham for this illuminating paper. I am sure one thing stands out very clearly, that in hitting upon this subject of the codification of international law, we have a matter which can engage our attention and that of our successors as long as the Society endures.

The time is now ripe for discussion, perhaps too ripe. It is within the order of the program, however, and the last thing we wish to do is to be impatient in dealing with the subject. (After a pause:) It is quite evident that you desire to devote some time to quiet meditation before you proceed with any further elaboration of views. Therefore, if there is nothing further to come before the Society at this time, I declare the meeting adjourned until tomorrow morning.

(Whereupon, at 10.30 o'clock p. m., the Society adjourned until tomorrow, Saturday, April 24, 1926, at 10 o'clock a. m.)

FIFTH SESSION

Saturday, April 24, 1926, at 10 o'clock a. m.

CONCLUSION OF THE ROUND TABLE CONFERENCE ON THE CODIFICATION OF INTERNATIONAL LAW IN RESPECT TO NATIONALITY

PRESIDING: Ellery C. Stowell, The American University.

The CHAIRMAN. We had a very interesting discussion yesterday of the matter of nationality. I think that we covered a great field, but I must confess that it seems that a greater field was left uncovered. Mr. Borchard, I think it was, made reference to the code of Field. As I remember, it was in the later Sixties or early Seventies, when he put out that very interesting code. It is a very rare book. I have only seen one copy for sale, and I bought that copy. I wish there were more available. In that code he attempts to meet the problem of nationality. A very distinguished French scholar, Gogordan, a disciple of the great Renault, devoted himself particularly to this matter of nationality, and he seems to have reached the same conclusion, generally speaking, as our distinguished jurist, Field, and he gave out the aphorism, if I may translate it, that "everyone should have one nationality, but one, and be at liberty to change it." That is, he would recognize a right of expatriation. This right of expatriation, which was so ably discussed by Dr. Hazard, and with respect to which the statements of law were very interestingly controverted by Professor Borchard, has been a policy of the United States. Dr. Hazard pointed out that it was illogical to give the right of expatriation without giving also the means to make it good, that is, emigration. In the early part of the last century and up until recently, government control was not as complete as at the present time, and the freedom to emigrate existed in fact. Everybody had the liberty to emigrate if he had the cash to pay the transportation. Under those circumstances an emigrant in the new country only had to consider whether he was accepted by the new country, and a country like the United States that was seeking adhesion to its polity, adopted the new citizen.

In those days the real test of the right of expatriation came to the fore when this new citizen went back to his country of origin, and then it was that the United States took the ground that it would defend its citizen by adoption in every part of the world, and it was made a part of our law not to distinguish between the citizen by birth and the citizen by naturalization. Such was the declaration of Congress adopted in 1868.

Two years after that, in 1870, Great Britain modified her naturalization system and permitted expatriation under very liberal provisions. It is a

curious commentary that in this country, which advocated this doctrine of expatriation primarily, it was not until 1907—and Mr. Hazard and Mr. Flournoy will correct me if I misstate it—that the United States made any provision for the exercise of this great right of expatriation. Before that date an American citizen could not get rid of his nationality and be sure of doing it. The status of the American woman was doubtful. There was no definite law with regard to the other side of this right of expatriation, that is, getting rid of American nationality. The assumption seemed to be that everyone wished to become an American, but that nobody had any desire to lose his American nationality.

In this question of the right of expatriation the position of the individual as a subject of international law comes to the fore. I should like to refer to that very remarkable work, *Diplomatic Protection*, by Professor Borchard, of Yale. I use it constantly. In that work, which is a mine of information on questions of nationality and diplomatic protection, he brings to the fore in numerous places the right of the individual under international law. He takes a rather conservative view, however. I think we will never get very far on this subject until we do recognize the position of the individual in international law.

Our international law is derived from three sources: Public relations between the politically independent communities, that is, the law of war and the law of treaties derived from truces. This constitutes the real law between communities, of which the modern states are the successors. The other two ingredients of international law have not yet been recognized. I am rather radical, and am going pretty far in daring to get up here and speak about it. It will injure my academic standing, I have no doubt, but I base my statement of the law on the practice of states, and I am not afraid to say it. I take the consequences. The other two ingredients come from the law of which the individual is the subject. Let me point that out to you.

Before the states were so developed in their control, individual merchants went all over the world and carried on commercial relations between independent communities, but as individuals. When an individual merchant was interfered with and unjustly treated his right was redressed by that individual himself and his friends through reprisals. It was a right of the individual who was injured, and the community helped him to make good his right. This system of redress led to complications between the independent communities to which the respective parties belonged, and in the course of time this right was restricted,—subjected to a certain procedure, and eventually special reprisals were abolished and the states took them over and substituted diplomatic protection. This diplomatic protection which has taken its place is really carrying on that right of the individual, and, like all rights of the individual, it is subject to the superior right of the community.

So much for the second ingredient. There is a third ingredient, and that is the minimum of right which an individual, as a part of the com-

munity of the world, enjoys. I am treading on very dangerous ground, because it is new. Mr. Borchard, in his very remarkable work, makes reference to this right in his preface. He does not come out very categorically in defense of this right, but the practice of states shows that when an individual is not given certain rights, a minimum of right in another jurisdiction, even though he is given the same rights as the citizens of that community, his own state will intervene and see that he is protected to the requisite minimum. In other words, national treatment is not the criterion. There is an international standard which, as an individual, he has the right to enjoy, and that, taken in connection with humanitarian intervention, which is in accord with the practice of states, makes clear that if you base your law upon the practice of states, and not upon some dogmatic theories which come down to us from the days of Pufendorf and the specious doctrines of the natural law, there is a right of the individual under international law. You have to take it into account when considering expatriation. I should like to go on and outline how this fundamental principle applies in expatriation, but I fear I have taken nearly ten minutes already. I did not intend to take so much time. Instead of going on, in the discharge of my duty as presiding officer I am going to throw open the discussion, and I will call upon the two experts who have led the discussion to make short statements that they have prepared in regard to the discussion of yesterday. Before I call upon Mr. Flournoy and Mr. Hazard, I will say that we are now to continue the discussion on nationality. When the discussion on nationality is terminated other subjects may be considered so long as we have the time, but we have a rather brief time, because the Society will soon meet and has important business to transact.

I will now call on Mr. Flournoy of the Department of State.

Mr. FLOURNOY. I will not take up much time. I occupied a good deal yesterday. One point I would like to emphasize, however, is that in this subject of nationality, the practical considerations and the actual conditions that we face are far more important than any views expressed by writers. It does not help us very much to read what someone wrote some years ago on the subject of expatriation. It is a developing theory. Whether it has actually crystallized in international law yet, I suppose there is some difference of opinion.

The other point I want to mention is that our own country, although it has certainly stood for the right of expatriation, and has been a pioneer in that field, nevertheless has also emphasized not only the right of the individual to change his nationality, but the obligation of the individual to fulfil the duties of the nationality which he assumes. It is not a mere empty mechanical process. It should be a reality.

In that connection a good deal has been said about the question of the duties of citizenship. What are the duties of citizenship, or are there really any legal duties of citizenship?

I do not intend to read it at length, but I call attention to the very able

opinion rendered by Mr. Justice Van Devanter in the case of Luria *v.* United States, 231 U. S. 9. I will read a brief part of it—that related to the case of the Russian who obtained naturalization in the United States, and very shortly afterwards went to South Africa and established himself there permanently in the practice of medicine. He had been there for years, and proceedings were brought under Section 15 of the Act of 1906 to cancel his naturalization on the ground that it was unlawfully procured. In the course of his opinion Mr. Justice Van Devanter said, with regard to the requirements of naturalization:

> These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name—that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission be mutually beneficial to the Government and himself, the proof in respect to his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past.
>
> By the clearest implication those laws show that it was not intended that naturalization should be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance without taking upon himself those of citizenship here, or by one whose purpose was to reside permanently in a foreign country and to use his naturalization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here. Naturalization secured with such a purpose was wanting in one of the most essential elements—good faith on the part of the applicant. It involved a wrongful use of a beneficent law. True, it was not expressly forbidden; neither was it authorized. But, being contrary to the plain implication of the statute, it was unlawful, for what is clearly implied is as much a part of the law as what is expressed.

Justice Van Devanter no doubt had in mind the fact, which is a matter of common knowledge, that numbers of persons have come to the United States in the past, secured naturalization solely for the benefits which they might get from it, and without any real intention of transferring their loyalty as well as their legal allegiance to the United States. Especially has that been common in cases of persons from southern and eastern Europe. It is not at all uncommon for such persons, if they are married, to leave their wives in their native land, come over here and obtain naturalization, and go back and forth, living alternately in the two countries, and raising families in the native land. Those children born after naturalization, are born citizens of the United States under our law. It was to meet that condition that the Act of 1907, raising the presumption of expatriation through protracted residence abroad, was passed. There is some criticism of that law. It has defects. I realize that fully, because I have had to assist in the administration of it. It should be more definite, undoubtedly. My own opinion is that there should be some judicial process for actually terminating

the nationality of persons in those cases; but, nevertheless, the law has done a great deal of good, and it has been of great assistance to the Department of State in determining whether or not individuals were entitled to the protection of this government.

In that connection I can hardly agree with one statement made by my colleague in his excellent paper yesterday with regard to the amendment of that law. I certainly am not in favor of any provision under which the individual may overcome this legal presumption merely by going through some process of registration. That mere declaration should not control. The actual conduct of the individual, where he lives, and how he acts, should determine his status, and not mere registration, or anything of that sort.

Professor WILLIAM I. HULL. May I ask if, in accordance with your domicile plan for the settlement of the question of nationality, it would not be requisite to follow up any such national legislation by a series of conventions, just as naturalization has had to be followed up by a series of conventions? If so, has not the question really, as a matter of fact, already become an international question, and therefore should it not be attacked, frankly, by an international conference?

Mr. FLOURNOY. I think it should. I think we could begin by domestic legislation. These people who are nominally Americans and not real Americans do not do us any good. We might as well get rid of them by our own legislation, in my opinion, but I think it would be most desirable to have international conventions also covering the same subject, so that the rights in the converse case could be decided; for instance, a Frenchman who is born here of French parents. Those cases frequently occur. They may be 25 or 30 years old and may never have lived in France at all. They were born and reared here, and all their interests are thoroughly American. If they want to go back to France on a visit, to arrange family affairs or to attend to business, or for scientific purposes, they cannot go as American citizens. The only way to settle that is undoubtedly through international conventions.

Mr. HENRY B. HAZARD. Mr. Chairman, for the sake of clarity of the record, I should like just a few moments. I want to thank Mr. Kingsbury for calling attention yesterday to the national status of the American woman who married an alien prior to the Act of March 2, 1907, as he had discovered it in an old case decided by the United States Supreme Court, that of Shanks *v.* Dupont. He had reached the conclusion that the citizenship of the wife was not lost. After a somewhat extensive examination of the question a while back, I had reached the same conclusion, although it might have appeared to the contrary from one of the statements in the short summary which I read here. Yesterday, in discussing problem No. 3, "International problems in respect to the nationality of married women," under question (a), "Should the nationality of a married woman as a rule follow that of her husband?" I had stated:

> The common law rule was based on the oneness of husband and wife, with the husband as "the one," and his headship of the family, but opinion and custom have materially changed, particularly in the past 75 years, with steadily increasing reform legislation and procedure eliminating the disabilities of married women.

The reference which I made there was intended in a general sense only, and not specifically with reference to the national status of women prior to the Citizenship Act of 1907. In that connection I quote a couple of paragraphs from my formal paper which I handed to the reporter yesterday.

> Prior to the passage of the Act of March 2, 1907, with the provision in Section 3, "That any woman who marries a foreigner shall take the nationality of her husband," the citizenship status of an American woman married to a foreigner was in doubt, even though it had been claimed that the matter above quoted was merely declaratory of the then existing law. While a lower Federal court, in Pequignot *versus* City of Detroit (16 Fed. 211) had in 1883 held that an American woman who married a foreigner took her husband's nationality, other decisions support the view that the wife either retained her American citizenship, or did not lose it unless she took up residence outside of the United States, or at least that there was doubt as to her status.

Compare:

> Shanks *v.* Dupont (1830), 28 U. S. (3 Pet.) 242, 246–250;
> Beck *v.* McGillis (1850), 9 Barb. (N. Y.) 35, 49;
> Comitis *v.* Parkerson, *et al.* (1893), 56 Fed. 556–564;
> Jennes *v.* Landes (1897), 84 Fed. 73;
> Ryder *v.* Bateman (1898), 93 Fed. 16, 21;
> Ruckgaber *v.* Moore (1900), 104 Fed. 947–949;
> Wallenburg *v.* Mo. Pac. Ry. Co. (1908), 159 Fed. 217–219 (marriage in 1904);
> *In re* Fitzroy (1925), 4 Fed. (2d) 541–542 (marriage in 1905).

> As Mr. Justice McKenna stated in Mackenzie *v.* Hare (239 U. S. 299, 311–312), upholding the constitutionality of the above quoted section,
>
> "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences."

Prior to the Act of March 2, 1907, there was no statute to put the American woman who married an alien on notice, and it would seem unreasonable to hold that her constitutional right of citizenship was lost through a mere inference without any statute on the subject. The objections which have been urged to the Cable Act of 1922, I think, have proceeded to some extent from its effect upon American women who had lost their citizenship under the Act of March 2, 1907, and who were not provided for after the termination of the marriage, by the Cable Act. Possibly legislation restoring the portion of

the Expatriation Act of 1907 providing for the easier resumption of citizenship of the American women, and which was repealed by the Act of 1922, might overcome that difficulty. The part of Section 3 of the Act of March 2, 1907, in question is this:

> At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

Professor Borchard's suggestion, which, as I understand it, is that the wife should acquire the husband's nationality on marriage unless she elects otherwise, might possibly be acceptable. Whether the women themselves would agree, I do not know. They are competent to speak for themselves, but certainly we have a condition present now, as represented by the Act of September 2, 1922, the Cable Act, which the women themselves have been insisting upon,—the independent right of naturalization and citizenship of married women.

The CHAIRMAN. There is some little time for further discussion of this question and any other questions that may come up before the regular meeting of the society. I will restate the rules governing this discussion, as adopted yesterday. Each speaker will limit his remarks to five minutes. If he is interrupted and wishes to yield, the time will be taken out for that interruption. In that way the discussion will continue.

The president of the Society has come into the hall, and has consented to preside for the continuance of this discussion. I have the honor to turn the meeting over to our president, Mr. Hughes.

(The Honorable CHARLES EVANS HUGHES thereupon assumed the chair.)

Dr. JAMES BROWN SCOTT. Mr. President, the last speaker stated that he was not competent to express the point of view of the women. From some experience running over a number of years I should be glad to confirm his modesty in that matter. The women are competent to speak for themselves, and they have.

My friend, Mr. Wright, has just handed me a paper which I asked him to present, but which, with characteristic modesty, he refused. It is an article in the April number, for the present year, of the *Bulletin of the Pan American Union*, by Bertha Lutz, President of the Inter-American Union of Women and the Brazilian Federation for the Advancement of Women. On page 397 of this publication she has certain introductory remarks and then proceeds to what are called general principles.

> It is held, in modern democracies, and rightly so, that the point of view of those chiefly affected by the nature of legislation should not be overlooked. This, in the present case, is the point of view of the women themselves.

But have they a point of view? They have indeed, and one clearly expressed by the representatives, many of them official, of the women of 43 nations in congress assembled, at the ninth meeting of the International Woman Suffrage Alliance in Rome in May, 1923, which drew up and advocated the following rules:

I. General Principles

(a) EFFECT OF MARRIAGE. A woman's nationality shall not be changed solely because of:

1. Marriage, or—

2. A change in the nationality of her husband during marriage.

(b) RETENTION OR CHANGE OF NATIONALITY. The right of a woman to retain her nationality or to change it by naturalization, denationalization, or denaturalization shall not be denied or abridged because she is married.

(c) ABSENCE OF CONSENT. The nationality of a married woman shall not be changed without her consent except under conditions which would cause a change in the nationality of a man without his consent.

II. Particular Applications

(a) RETENTION OF NATIONALITY. A woman shall not lose her nationality solely because:

1. She marries a foreigner, or—

2. During marriage her husband loses his nationality by naturalization in another country, or otherwise.

(b) LOSS OF NATIONALITY. A married woman shall lose her nationality only:

1. Under conditions which cause a married man to lose his nationality, or—

2. If she, on marriage or during marriage, is deemed by the laws of the State of which her husband is a national to have acquired his nationality, and if she make a declaration of alienage.

(c) RIGHTS IN ACQUISITION OF NATIONALITY.

1. A woman of foreign birth shall not by sole reason of marriage acquire the nationality of her husband.

2. A wife shall not solely by reason of her husband's naturalization be thereby naturalized.

3. A married woman shall be naturalized under the same conditions as apply to a married man.

4. Special facilities shall be given to a woman to acquire the nationality of her husband; and special facilities may be given to a man to acquire the nationality of his wife.

(d) REACQUISITION OF NATIONALITY. A married woman who has lost her nationality in order to acquire that of her husband shall on the dissolution of the marriage by death or divorce be given special facilities to reacquire her own nationality should she return to her own country.

(e) RETROSPECTIVE PROVISIONS.

1. *Loss of nationality by or through marriage.* In cases where, before the adoption of legislation based on this convention, a woman has lost her nationality by sole reason that (1) she married a foreigner, or (2) that during marriage her husband changed his nationality, she shall after the adoption of such legislation reacquire her nationality upon making a declaration to this effect.

2. *Acquisition of nationality by or during marriage.* When a woman who by marriage or by the naturalization of her husband has acquired the nationality of the latter, before the adoption of legislation based on this convention, she shall retain that nationality except she make a formal declaration of her desire to the contrary.

(f) PROTECTION FOR THE WOMAN WITHOUT A COUNTRY. If a woman by the laws of her own State should by marriage lose her nationality, she shall be entitled to a passport and to protection from the State of which her husband is a national.

Such, apparently, is the series of resolutions adopted by the women themselves in solemn convention in Rome, in May, 1923. Miss Lutz is good enough to follow up this statement of principles by a subsection called "The Legal Point of View." I move, Mr. President, that this statement of the views of the women, from an accredited representative, together with the three paragraphs of the article concerning the legal point of view, be included in the record so that it may not be unilateral, but bilateral.

(The motion was agreed to, and the section referred to, entitled "The Legal Point of View" is as follows):

This is not merely a theoretical view of the subject under discussion, for it is legally sound as a doctrine and has the approval of such eminent jurists as Prof. André Weiss, the representative of France in the Permanent Court of International Justice, and Sir Ernest Schuster, President of the Committee on Nationality of the International Law Association. Moreover, in Latin America, it has been proclaimed by such jurists as Alejandro Alvarez and Cruchaga Tocornal of Chile, Luiz Pereira Faro, Clovio Bevilacqua, and Rodrigo Octavio of Brazil, and by Zeballos, the great Argentine authority, who says:

The position of woman before the law which I have just analyzed is unfavorable and unjust. It can not by any means be considered the logical conclusion of the principle universally admitted since the time of Cicero, by which nationality must be a self-determined right. Therefore, the law may not impose a change of nationality on women by the mere fact of their marrying.

It is indispensable that the laws be amended so that they be made to respect the autonomy of women. If a woman desires to change her nationality so as to follow that of her husband, let her do so, but let it be a naturalization of the same kind as any other.

Zeballos further confirms these doctrines by the enumeration of the general juridic principles of nationality, which are:

1. Nationality is a self-determined right.
2. Every person should have a nationality.
3. No person should have more than one nationality.
4. Every person has the right to change his or her nationality.
5. The State has not the right to prevent persons from changing their nationality.
6. The State has not the right to oblige persons to change their nationality against their will.
7. Every person has the right to reacquire the nationality he or she gave up.
8. The State may not impose its nationality on those domiciled in its territory against their will.
9. Nationality, either by birth or acquisition, determines the application to persons of public and private law.
10. The State is obliged to determine as to public and private law the condition of persons that are without nationality—*heimatlos*.

Could there be a more logical or more legal sanction than these principles, especially Nos. 6 and 8, of the woman's point of view?

From the foregoing study it is easy to conclude that in spite of great divergence in the laws of different countries, the rule that makes a married woman follow the nationality of her husband is no longer absolute and that, on the contrary, the exceptions are fast becoming the rule. It is equally evident that the forward tendency is to confer independent citizenship on women, principally in the American Continent, where *jus soli* is adopted, in preference to *jus sanguinis*.

Encouraged by the fact that several of the Republics, and these by no means the least progressive, already insure the inviolability of the nationality rights of their women; that others are at present remodeling their codes and institutions, and that liberality and progress are essential features of the American Continent, we hope and feel assured that the day is not distant when the independent citizenship of married women will be a uniform and universally adopted principle in the whole of the Western Hemisphere.

Professor GARNER. In connection with the proposals of the International Women's Suffrage Alliance, which Dr. Scott has just read, I should like to call the attention of the members of this Society to a most admirable discussion of the whole subject by an English woman, Miss MacMillan, a member of the International Law Association and a woman who appears to be held in very high esteem by English jurists. This article will be found in the *Journal of the Society of Comparative Legislation* for November, 1925. It is the most exhaustive and illuminating discussion of the whole point of view of the women which, in my judgment, has been printed.

Apropos of the question raised by Professor Hull regarding a possible solution of the matter by international convention, I should like to call attention to two proposals which have recently been made. One is a proposed model statute, coupled with a proposed international convention which was unanimously adopted by the International Law Association at its meeting in 1924. It was worked out by a committee of eminent jurists under the chairmanship of the late Dr. E. J. Schuster, and among his colleagues were such men as Dr. H. H. L. Bellot, Professor Schücking, the late Dr. Jitta, Judge Barrett, and others. The model statute deals with certain aspects of the problem, and is proposed for concurrent adoption by the different states of the world, somewhat as our uniform laws in this country have been proposed. The conventional part of it deals with the subject of dual nationality, the status of married women, and the subject of expatriation. Mr. Flournoy referred to this report in his address, and if I recall correctly, he criticized certain parts of it, but I think that model statute and convention are well worth consideration. I venture to say, in this connection, that the example which the International Law Association has set in having this whole matter studied carefully by an able committee and put in the form of a concrete proposal and adopted by the Association is one which this Society might very well emulate.

The other proposal is in the form of a brief code of eleven articles worked out by a Dutch jurist, Dr. Bles, and it is printed in the *Revue de Droit Inter-*

national et de Législation Comparée (1921), with appropriate analysis and comment. It is entitled *Un droit Uniforme sur la Nationalité*, and is a very worth while study. I was struck by the points of agreement in both of these proposals. One of them was the proposal that no man or woman should under any circumstances be deprived of his nationality in any other way than by naturalization in a foreign country. That is, it could not be lost by long residence abroad, by marriage to an alien, or by administrative order, or even by judicial condemnation. That is going pretty far, but it certainly would do away with the status of statelessness. It is somewhat significant that both of these proposals were in agreement on that point.

Mr. Flournoy, in his learned discussion yesterday, and in his address before this Society last year, emphasized another aspect of the question which Anglo-American law and practice, it would seem to me, too much ignore, namely, the importance of domicile in determining nationality. It is somewhat curious, because it is domicile rather than nationality which is the basis of English and American law in determining enemy character in time of war. As Mr. Flournoy pointed out, I think, there is something anomalous in imposing nationality, *ipso facto*, upon children born of mere transient aliens, as the Fourteenth Amendment to the United States Constitution does, and as British law does. Many of those children are taken back to their own countries soon after birth, and yet, under the unqualified doctrine of *jus soli*, the United States is called upon to protect those persons who have never resided in this country. It is also called upon to grant them passports to travel. It seems to me that the law of France, Colombia, Ecuador and other Latin American countries, which apply the doctrine of *jus soli* only to children born of domiciled aliens, is more logical and reasonable. The conferring of nationality upon a child who happens to be born in a country while his parents are temporary sojourners there is illogical, and I think absurd. It is very much as if you were to confer the right to vote upon a stranger who happened to be visiting a foreign country at the time of an election. I am glad Mr. Flournoy emphasized that point. I think it deserves it.

Professor GEORGE GRAFTON WILSON. May I ask Professor Garner one question? How were you defining "domicile" in this particular case?

Professor GARNER. I was not defining it, but I think there is a pretty clear distinction between the status of a domiciled alien and a mere temporary sojourner or tourist. It is a matter of degree, I quite admit, but everyone knows that a child born of a tourist or temporary sojourner, and who is taken back to the country of his parents soon after his birth, has no just claim upon the United States for protection. Yet he is a citizen and may demand it. The other country has a much better moral claim on him. It is otherwise, of course, with the alien who remains here permanently for a long period of time. Mr. Chairman, I question very much the moral right of a country to confer its nationality upon foreigners under any such circum-

stances. It is very much like Article 3 of the Act of March 2, 1907, which says that an American woman who marries an alien *shall* take his nationality. It was repealed, of course, by the Cable Act. Now, I submit it is certainly not within the moral right of the United States to say whose nationality such a person shall take. That belongs to the country of the husband.

Dr. HARRY PRATT JUDSON. Some very peculiar things result from the ordinary laws respecting change of nationality in which the party concerned, for legitimate reasons, has little voice in the matter. A case came to my attention last year, which I cite merely as illustrating some of these oddities. A woman born in Germany, of German parents, and therefore a German national, is the example. The first odd thing was that, although her parents were of German race, each one had acquired German nationality by naturalization. The father, coming from the Baltic provinces, then in Russia, was a Russian national, although of German race. The mother was an American national, whether by naturalization or birth here I do not know, but she was an American national of German race. By marriage to this German man she became automatically a German national.

There were two children born of this marriage. Some years afterwards the family came to the United States. I may say the gentleman interested was Professor von Holst, the historian. He brought with him his wife and the minor children. In due time he was naturalized as an American citizen, and that naturalization automatically naturalized the wife and two children. They all became Americans. In a few years his health broke down and he went back to his German home to spend the rest of his days, taking his wife and daughter. The boy stayed here and is an American citizen now. Sometime later the young woman married an officer in the Austrian Army, thereby becoming automatically an Austrian national. She lived in Austria. Then the World War came on, her husband died during the war, and the widow remained there until the war ended, and then Austria went to pieces. It happened that this husband of hers, an officer in the Austrian Army, was a Czech, and his home and property were in Bohemia. By the Treaty of Peace thus she automatically became a Bohemian national. There she was. She had been a German, an American, an Austrian, and now a Bohemian or Czech. Of all those changes, she had a voice in only one. She certainly was not consulted about her German nationality. When she became an American, she was a minor. That change was automatic. I suppose she had some voice in the choice of the Austrian officer, her husband. She certainly had no voice in becoming a Czech. It bothered the American Consul in Bohemia. She wanted to come here to visit her brother. We had no trouble in arranging it finally, but I was impressed with the oddity of it. A person may become changed in national character for good and sufficient reasons without any volition on his part whatever.

Just a word in conclusion. Of course, expatriation may or may not be a natural right. I do not propose to discuss that, although I have a pretty

definite idea about it. But, impatriation certainly is not a natural right, and can be gained only by the laws of the country in which one seeks citizenship. The discussion of the two has seemed to be a rather obscure mixing of the two things—expatriation, or losing one's original nationality, and impatriation, or gaining a new one, which cannot come without accordance with the law of the new state.

Miss EMMA WOLD. Mr. Chairman, it is a little difficult for a woman, a new member of your organization, to speak to so erudite a company, but I want to call your attention to the fact that there is a great deal still to be done by those of us who believe that a married woman should not be in a different class from other citizens. I have examined this subject during the last year in behalf of women who have been in difficulty because they have lost their American citizenship, and sometimes have not gained another. It is rather absurd to say that all of us are citizens with like rights, and then put married women in a group by themselves, as we still continue to do under the Cable Act. I am very glad that the gentleman read the extract from Miss Lutz's article, because that states in detail exactly the principle upon which I believe all American women who are thinking about this subject want to stand, that is, that they shall be regarded as citizens, and not as women, either married or single. We should stand in the same class with you men as regards the question of nationality and the loss of nationality. To us the subject of our American nationality is one of exceedingly great and practical importance, as has been shown during the last two years since the restrictive immigration law has come in to make more vexatious the laws of married women's citizenship.

I might call your attention right now to the point that I have not heard mentioned here in connection with the Cable Act, that is that while it provides for the woman who has lost her citizenship previous to September 22, 1922, it makes no provision for the woman who still continues to lose her citizenship, the woman who has married an alien ineligible to citizenship. There is no provision in that Act for the recovery of her citizenship on the dissolution of the marriage. There is no provision in the Cable Act for the recovery of American citizenship by the woman who has married an alien eligible to citizenship, a woman who goes out of the country to live in her husband's country, against whom the presumption of expatriation arises, and who, under the present rules laid down by the State Department, cannot overcome that presumption because she is a housewife and mother, and does not come within any of the classes which are recognized under the rules of the State Department as being able to raise facts in evidence of their intention to keep their citizenship.

The PRESIDENT. I am reluctant to see such an interesting discussion come to a close, but unless someone is very desirous to take part in it, the time has come, I believe, when we should attend to the necessary matters of business of the Society. Unless there is someone who desires to continue the

discussion further, we will now take up the matters of business pertaining to the Society.

BUSINESS MEETING

The PRESIDENT. Are there any reports of committees that are ready to be presented?

Professor JESSE S. REEVES. I have the honor to present the report of the Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law. (Reading):

REPORT OF SPECIAL COMMITTEE ON COLLABORATION WITH THE LEAGUE OF NATIONS COMMITTEE FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

Your Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law, appointed at the last Annual Meeting of this Society, was instructed as follows: To circulate a draft of a report to each member of the Council on or before September first, 1925, setting forth what in the opinion of the Committee were the subjects of international law, the solution of which by international agreements appeared the most desirable and possible of realization. The date set for the report was fixed in order that the Council might consider the report and if approved it be transmitted to the Committee of Experts for the Progressive Codification of International Law under the auspices of the League of Nations at its meeting in Geneva, which was set for November of 1925.

Of the seven members appointed upon the Special Committee of your Society, four were absent from the United States during the summer, and beyond the time set for the filing of the Committee's report. It was therefore impossible for the Committee to follow the exact instructions given it, and the Committee was unable to meet within the time set. The special urgency for a report having thus disappeared, the Committee did not meet for further consideration of the matter until the time of the present annual meeting. In the meanwhile, however, correspondence was had with reference to the consideration of topics to be suggested to be submitted to the Geneva Committee.

At the present time there have been adopted by the Committee of Experts for the Progressive Codification of International Law twenty-one topics as more or less suitable for consideration, and they are as follows:

1. Nationality.
2. Territorial waters.
3. Diplomatic privileges and immunities.
4. Public vessels engaged in commerce.
5. Extradition.
6. Responsibilities of states for damages to aliens in person or goods.
7. Procedure of international conferences; the drafting of treaties.
8. Piracy.
9. Prescription.
10. Exploitation of marine resources.
11. Extraterritorial criminal jurisdiction.
12. Commissions rogatory in penal matters.
13. International corporations formed not for profit.
14. Domicile.
15. Consuls.
16. Most-favored-nation clause.
17. Revision of established classification of diplomatic agents.

18. Jurisdiction of national courts over foreign states.
19. The nationality of commercial corporations and their diplomatic protection.
20. Recognition of juridical personality of foreign commercial corporations.
21. Conflicts of laws as to sales of merchandise.

The Committee, while recognizing that each of these topics might properly be considered scientifically looking toward an authoritative statement of the law involved under each topic, does not feel justified at this time to indicate what it believes to be the relative importance and urgency of the various topics, but does take occasion to express its conviction that those topics which fall under the general heading of private international law might well yield precedence in consideration to those topics more plainly in the field of public international law, and that priority of consideration should be given to those topics of most urgent importance and upon which it seems more likely that an agreement may be reached. The Committee has had under consideration a number of topics which it deems appropriate for transmission to the Committee of Experts at Geneva, and now recommends that the following topics be so transmitted:

1. State succession.
2. Criteria of *de facto* recognition of new states and new governments.
3. Canons of interpretation of treaties.
4. International servitudes.
5. The civil and commercial status of aliens transient and resident.

Very recently there have been received by the Society a series of printed documents from the Committee of Experts which in the judgment of the Committee seemed to constitute scientific material of the first importance. These are reports upon the topics of nationality, territorial waters, diplomatic privileges and immunities, responsibility of states for damage done in their territories to the person or property of foreigners, procedure of international conferences, the drafting of treaties, piracy, exploitation of the products of the sea, the legal status of government ships employed in commerce, extradition, and the criminal competence of states in respect of offenses committed outside of their territory. Without in any sense expressing any opinion with reference to the conclusions reached in these various reports, the Committee recognizes their extraordinary value as scientific studies and feels that they should be given a maximum of publicity, and to this end the Committee recommends that the Society, through its President, request the Board of Editors of the AMERICAN JOURNAL OF INTERNATIONAL LAW to publish such material, and further the Society requests its President, in view of the inadequacy of the funds at the disposal of the JOURNAL, to communicate with the Division of International Law of the Carnegie Endowment for International Peace, or some other agency, with the object of obtaining from the Division a subvention for the purpose of issuing a special supplement to the JOURNAL.

Further, in order that the membership of the Society may have at its disposal all of the documentary and source material recently appearing upon the general subject of codification, the Committee further makes a recommendation similar to that just made looking toward the publication of a second special supplement embracing the Report of the Committee of the American Institute of International Law, together with the thirty-one projects of conventions drafted by the Committee of the American Institute of International Law for submission to the Pan American Conference of Jurists to be held at Rio de Janeiro in April of 1927.

The Committee takes this opportunity of expressing its belief that a sound public sentiment upon the subject of the codification of international law can be developed in no better manner than by having the scientific results of these various bodies placed in the hands of the public of this country, and we believe that as an instrument for the scientific study of international law and its popularization, the American Society of International Law may well avail itself of the opportunity to render this public service.

Finally, since the list of topics appropriate for the consideration of the Committee of Experts is by no means exhausted, quite on the contrary it would seem that the work is just beginning, the Committee further requests that the Society authorize it to continue to coöperate in every possible way with the Committee of Experts and to render reports from time to time to the Council upon the progress being made.

The PRESIDENT. You have heard the report of the Special Committee. What is your pleasure? A motion that it be received will be in order.

Mr. HOWARD THAYER KINGSBURY. I move that it be received and referred to the Executive Council for such action as it may deem proper.

Mr. CHARLES HENRY BUTLER. I second that motion, but I think that as this is a committee appointed by the Society, there ought to be added "and that the committee be continued." I think the committee should be continued by the Society.

The PRESIDENT. Do you accept the amendment?

Mr. KINGSBURY. I accept the amendment.

The PRESIDENT. It has been moved and seconded that the report be received and referred to the Executive Council, and the committee continued.

Admiral WILLIAM L. RODGERS. I would like, sir, to agree with what Mr. Reeves has said about the great desirability of publishing these papers from Geneva, but his proposal to do so by means of the help of the Carnegie Endowment for International Peace seems to me somewhat undesirable, as it limits the independence of this Society to depend for its funds on another body.

The PRESIDENT. That question is not yet before us, may I suggest. The only question now before the meeting is the receiving of the report and the reference of it to the Executive Council, and the continuance of the committee. Are there any remarks upon that question?

(The motion was agreed to.)

The PRESIDENT. Is there any other committee to report? Is the Committee on Nominations ready to report?

Mr. FRED K. NIELSEN. Mr. President, in behalf of the Nominating Committee, I submit the following report:

AMERICAN SOCIETY OF INTERNATIONAL LAW

NOMINATIONS OF OFFICERS FOR 1926

Honorary President, Elihu Root

President, Charles Evans Hughes

Honorary Vice Presidents

Simeon E. Baldwin
Charles Henry Butler
Frederic R. Coudert
Jacob M. Dickinson
Charles Noble Gregory
Harry Pratt Judson
Robert Lansing
Frank B. Kellogg
John Bassett Moore
Oscar S. Straus
George Sutherland
William H Taft
George Grafton Wilson
Theodore S. Woolsey

Vice Presidents

Chandler P. Anderson — David Jayne Hill — James Brown Scott

Members of Executive Council to Serve until 1929

Edwin M. Borchard
Charles G. Fenwick
Richard W. Flournoy
James W. Garner
Arthur K. Kuhn
Frederic D. McKenney
Jesse S. Reeves
Ellery C. Stowell

(Signed) FRED K. NIELSEN,
Chairman.

The SECRETARY (Mr. GEORGE A. FINCH): Gentlemen, you have heard the report of the Committee on Nominations. What is your pleasure with respect to it?

(It was moved and seconded that the Secretary be instructed to cast the ballot for the names recommended by the Nominating Committee.)

The SECRETARY. It has been moved and seconded that the Secretary be instructed to cast the ballot for the officers whose names have been placed in nomination by the Committee on Nominations. Are there any remarks upon the question?

(The motion was agreed to.)

The SECRETARY. The officers recommended by the Committee on Nominations have been duly elected to the respective offices for which they were nominated.

The PRESIDENT. Gentlemen, I am deeply appreciative of the honor that you have conferred upon me in reëlecting me as President of this Society. I may say that I esteem it a very happy event in my life to have the opportunity to come out of the sordid work which is associated with activity at the bar, and out of the murky atmosphere of extra-political relations, into this rarefied air, where the heart beats more quickly, and where one feels, in spirit, somewhat attuned to the music of the spheres which we, I fear, never have the opportunity of hearing in the tumult of the street. I esteem it a very great honor indeed, and a privilege, to be associated with you in this work, in which, as we never resolve upon anything, we are never divided.

Is there any further business to come before the meeting?

MISCELLANEOUS BUSINESS

Mr. HOLLIS R. BAILEY. Mr. Chairman, it was suggested to me yesterday and again this morning, and the same thought has been expressed by some of the speakers, that this Society now has reached a point in its existence where it may emulate the activities of some similar bodies, namely, by formulating resolutions, and after proper deliberation by having them approved and printed in the PROCEEDINGS, so that we may go on record as some other bodies do go on record in favoring certain actions.

I have here a resolution which I will read and ask to have referred to the

Executive Council without discussion, unless discussion is desired. The resolution reads:

> *Resolved*, That the time has now come when the Society may properly approve and adopt reports on important topics for inclusion in our literature, and create committees on legislation to formulate bills to be introduced in Congress after the same have been approved by the Society.

That really amounts to two resolutions.

The PRESIDENT. Your motion is that this resolution be referred to the Executive Council?

Mr. BAILEY. Yes, sir.

The PRESIDENT. Is that motion seconded?

(The motion was duly seconded.)

The PRESIDENT. It has been moved and seconded that the resolution offered by Mr. Bailey with respect to the appointment of certain committees, as therein stated, be referred to the Executive Council.

Dr. JUDSON. I favor that motion to refer this resolution to the Executive Council, provided we may be confident that the Executive Council will bury it; because, as I understand the resolution, if it were carried, it would convert the Society into a body designed to secure legislation from Congress. I think there is another name for it which I prefer not to use—I will use it. I do not want this body to be converted into a body of lobbyists. We meet, and have met in all the years of our organization, as a society for the free discussion of international law. We have never tried to secure the adoption of legislation. If we once try, there is no end to it. Then we shall be divided into factions struggling for this, that, and the other piece of legislation.

The PRESIDENT. Are there any further remarks?

Mr. MILTON FAIRCHILD. There are really two resolutions. One has to do with the formulation of reports. In the discussion we have had on naturalization very important data have been presented. A committee could be appointed to formulate a report on this subject for consideration next year, the report to be presented to the Society for discussion, revision and publication. During the year communications could be sent to that committee, to assist the committee in making up its final report. The report finally, after being sanctioned for publication, could be included in our literature merely as a well organized, well considered statement, it might, perhaps, be called a scientific statement, with reference to the topic of the report.

In seconding the resolution, I am not in favor, particularly, of going after legislation, except as some emergency may arise, but I am very much in favor of the formulation of positive, well thought out, organized reports on important topics that come before the Society, in order that these may go

into our literature, be indexed, and be available for those who are interested in the good thinking which the Society does.

Dr. SCOTT. Mr. Chairman, without speaking of the resolutions particularly, I would like to say that this matter, in the form of a single resolution, was referred to the Executive Council yesterday afternoon and it was not acted upon favorably. I believe, before any action is taken here, either in favor of or against the motion made this morning, that the members voting should have full information as to the origin of the proposition and the refusal of the Executive Council yesterday afternoon to lend its approval to it.

The PRESIDENT. Dr. Scott, do I understand that this same resolution was introduced at a meeting of the Society?

Dr. SCOTT. At a meeting of the Executive Council yesterday afternoon, after we returned from the White House.

The PRESIDENT. I am aware of that, but I gathered that possibly you meant that it had been considered in a meeting of the Society.

Dr. SCOTT. No, sir; before the Executive Council yesterday afternoon, without approval.

Professor STOWELL. I do not know whether it is appropriate to be taken up here in connection with this motion or whether it should come before the Council, but in any event, as an informal statement, I think it will not be *inapropos*. It seems to me that the committee on codification, of which Professor Reeves has just made the report, might appeal to the whole membership of the Society by circular letter asking for coöperation on the particular topics that we have under discussion, and in that way it could be brought out what members of the Society are really interested in these things, and as a result, if it were possible to handle the machinery of the correspondence, we would be in touch with just the ones in the Society who would like to be active and work on these plans. I think that would be one of the best things for the Society to do. I have the feeling that sometimes we run along a little too much in the same rut, and that there are other members willing to help, perhaps abler than a good many of those who are now carrying on the work. They are often modest and unwilling to push themselves forward. If an appeal were made to them in this way, the officers of the Society would find out where the talent lay, and also the Society would benefit in this way.

Professor WILSON. May I say a word in regard to Professor Stowell's suggestion? If the work which this committee of which Professor Reeves is Chairman is to be done, manifestly it cannot be done by that committee, because it is requiring the attention of a very large number of people all over the world with expert services of every kind to do it. I think it would be well for that committee to consider—this is not *apropos* of this particular motion—

The PRESIDENT. It is quite distinct. We have already acted on the other matter, Professor Wilson, by referring it to the Executive Council.

Mr. WILLIAM H. BLYMYER. I wish to say a word with regard to the change of policy in undertaking to pass resolutions with regard to certain amendments to the law and otherwise. I think it is very well for this Society to receive reports after the committees have worked upon various subjects, reports both in favor of and contrary to any views, but I think they should simply be received for the purpose of accumulating information on the subject, and that no attempt should be made to pass resolutions upon them. After a resolution has been adopted, the matter, in a way, passes beyond the control of the members to bring it up, and the Society binds itself to a change in the nature of a political movement. All scientific societies should preserve their freedom, so that any member may feel that a matter is open for discussion so long as it has not been fully adjusted to the satisfaction of the public. I feel that this Society should be considered a scientific body and should be continued upon that basis.

The PRESIDENT. The motion is that this resolution, embracing the proposal that committees should be appointed to formulate topics for legislation, be referred to the Executive Council. Are there any further remarks?

Mr. KINGSBURY. I rise to a question of information, Mr. President, whether it would be appropriate for the Society to express the sense of the meeting on that question, in the reference of the motion to the Executive Council, or whether that would be deemed inappropriate.

The PRESIDENT. I suppose it is appropriate for the Society to do, within the limits of its constitution, whatever it desires. The present motion does not embrace that.

Mr. BUTLER. The constitution says, with regard to resolutions of this kind, that all resolutions relating to principles of international law or international relations, which shall be offered at any meeting of the Society, shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or to the Council, and no vote shall be taken until the report shall have been made thereon.

Either the chairman can, of his own discretion, refer this to the Council, or any three members can ask that it be referred to the appropriate committee or to the Council.

The PRESIDENT. I do not understand that this is a resolution dealing with international relations or international affairs. This is more a resolution as to the procedure of the Society, as to whether it will have committees, and what those committees shall do; whether it shall undertake to have committees dealing with legislative proposals, and so forth, as stated by Mr. Bailey, or whether the question now is merely one of procedure that shall be referred to the Executive Council. Are there any further remarks?

Dr. JUDSON. May I move to amend? I move to amend it by adding the words "with an adverse recommendation."

Dr. SCOTT. I second the amendment.

The PRESIDENT. I do not know that the amendment is germane to the

purpose of the resolution. I should say that that amendment was out of order. Are you ready for the question?

(The motion was agreed to.)

The PRESIDENT. Are there any further remarks?

Professor FENWICK. Mr. President, I should like to raise one question in respect to our program, which will only take a few moments of the business meeting. I think it is the general consensus of opinion that the plan of round table discussion of the topics on the program has been very stimulating. It has brought out a variety of points of view, and I think we can agree that we have not exhausted the topics and could have continued discussing them for another day or two.

I should therefore like to suggest that we change our program slightly. I was first going to propose that we begin on Wednesday evening with the opening address by the President of the Society and then have two full days for the discussion of the topic before us; but, quite clearly, a program beginning on Wednesday evening would mean, for those who come from the Middle West, to say nothing of the Far West, a wide break in their academic duties; and therefore my present suggestion is that we begin on Thursday evening, as usual; that we carry on our round table discussions Friday and Saturday, and that we take our business meeting from Saturday morning and put it on Friday afternoon, giving Saturday morning and Saturday afternoon to the discussion of the topic before the Society. That will give us two full days of discussion. At present Saturday afternoon is thrown away, so far as the purposes of the Society go, and Saturday morning is broken by the business meeting. We could very easily have the business meeting late Friday afternoon, and then give Saturday to the discussion. In other words, I recommend a program of two full days.

The PRESIDENT. Do you make a motion?

Professor FENWICK. I move that the program committee for the coming year consider the possibility, or the feasibility, of beginning our program as usual on Thursday evening, but giving the full sessions on Friday and Saturday to the topic under discussion.

The PRESIDENT. Is the motion seconded?

(The motion was duly seconded.)

The PRESIDENT. It is moved and seconded that the program committee consider the feasibility of devoting two full days, as stated by Mr. Fenwick, to discussion of the topic before the Society, the business meeting to be held at such time as not to interfere with the devoting of two full days to that purpose.

Secretary FINCH. I understand the motion to be simply the expression of a recommendation, and it does not bind the program committee. I would like to state that there are certain practical difficulties connected with running a meeting that always have to be taken into consideration in addition to the question of our academic discussion. For instance, the suggestion was

made that we have a session on Saturday afternoon, which would be very difficult to carry out if we are depending upon having the session here in this room, or in any other hotel. We always end with a dinner, and the management insists that they must have time to arrange the room for the dinner. It takes a good deal of time, so that I do not believe it would be possible to have the Saturday afternoon session, say, in the Willard Hotel, or in any other hotel where we have the dinner. That is the reason why we have never had a session on Saturday afternoon.

Mr. BAILEY. Is it not true that upstairs there is a very excellent auditorium, better than this, for such a meeting as we want to have? I remember meeting up there years ago, day after day, and there is also a banquet room up there, as well as a very excellent small auditorium.

Secretary FINCH. That is perfectly true, but we must remember that we are not the only organization which uses this hotel, and we cannot go around and pick the rooms we want at certain times. We have to accommodate ourselves to other arrangements. Tonight, for instance, we will not have our dinner in this room because there is some other organization here that got in ahead of us, and we will have our dinner in the next room. So far as that is concerned, it will make no difference. I am simply stating that to show that there are other things going on here. So far as the large ball-room is concerned, our dinner for 200 persons would seem lost in an auditorium that seats 1000, and the hotel uses that room for larger functions. We have met before in other rooms in this hotel, smaller rooms, and every time we have met in them there has been an avalanche of adverse criticism of the committee for having those rooms. If we do not have these particular rooms for our meetings a great many members are not satisfied. We can do these things within limits, but if we cannot do them to the entire satisfaction of everybody it is not because we do not wish to do them, but it is because we have to recognize the limitations upon our freedom of action.

The PRESIDENT. Are you ready for the question? The motion is that the program committee shall consider the feasibility of having two full days devoted to the discussion of the topic before the Society.

(The motion was agreed to.)

Professor STOWELL. We had last year, Mr. President, a very important meeting on international law and related topics, and for the purpose of informing the Society, I should like to ask if we might not call upon Professor Dickinson, the director of that conference, to make a report with respect to the conference and the Proceedings that have just been published.

Professor EDWIN D. DICKINSON. Mr. Chairman, I did not expect to make any report. I have no report to make. The Conference of Teachers met here at the time that this Society was meeting, a year ago. The volume of the Proceedings has been very ably edited by a committee of which Mr. Stowell was chairman. It has been published and is now ready for distribution. I think perhaps all of the members of this Society, including those

who were not participants in the Teachers' Conference, will be interested in examining the printed volume of the Proceedings.

The PRESIDENT. Is there any further business to come before the Society? If not, a motion to adjourn is in order. The meeting of the Executive Council will be held in this room immediately following the adjournment of the Society. The meeting of the Executive Council will, of course, include the new members who have been elected to serve until 1929.

(Whereupon, at 11.45 o'clock a.m., the meeting of the Society adjourned.)

ANNUAL DINNER

The New Willard Hotel, Saturday, April 24, 1926, at 7.30 o'clock p. m.

TOASTMASTER

THE HONORABLE CHARLES EVANS HUGHES
President of the Society

SPEAKERS

THE HONORABLE CHARLES G. DAWES
Vice-President of the United States

BARON AGO MALTZAN
German Ambassador to the United States

DR. J. VARELA
Minister from Uruguay to the United States

PROFESSOR ARCHIBALD CARY COOLIDGE
Harvard University

MEMBERS AND GUESTS

Miss Nell Adamson
Bernabe Africa
Dr. and Madame R. J. Alfaro
Miss E. W. Allen
S. Gurgel do Amaral
Mr. and Mrs. C. P. Anderson
Mrs. Fannie Fern Andrews
Sr. Jose del C. Ariza
Senora Luisa J. de Ariza
A. Leonard Astrom
Mr. and Mrs. H. R. Bailey
Mr. and Mrs. A. H. Baldwin
Francisco Banda
Jos. J. Baron
Mr. and Mrs. R. S. Barrett
S. F. Bedoya
C. M. Bishop
Kazys Bizauskas
William H. Blymyer
E. M. Borchard
Mrs. Mary H. Bradley
Ira H. Brainerd
Miss Eveline W. Brainerd
Miss Vera Brittain
Miss Bernice V. Brown
Prof. and Mrs. P. M. Brown
L. B. Bryant
Charles Henry Butler
Mr. and Mrs. A. D. Call
J. M. Callahan
Mitchell B. Carroll
Hector David Castro
G. E. G. Catlin
Melville Church
Malcom A. Coles
Archibald C. Coolidge
W. P. Cresson
Guy W. Davis
Charles G. Dawes
Clarence W. DeKnight
Miss Jessie Dell
Senator and Mrs. C. S. Deneen
Edwin D. Dickinson
Mrs. H. F. Dimock

Allen W. Dulles
Mr. and Mrs. F. S. Dunn
Mr. and Mrs. Wade Ellis
Chester B. Emerson
Lawrence B. Evans
Milton Fairchild
George A. Finch
Richard W. Flournoy, Jr.
Mrs. John C. Fremont
Leonard M. Gardner
J. W. Garner
Mr. and Mrs. R. E. Goldsby
R. L. Golze
Roberto M. Goncalves
Leland M. Goodrich
Mrs. William C. Gorgas
Mr. and Mrs. Samuel J. Graham
Col. and Mrs. Walter S. Grant
Wilfred T. Grenfell
Franklin M. Gunther
Max Habicht
Mr. and Mrs. G. H. Hackworth
Miss Laura Harlan
E. A. Harriman
W. A. Hayes
Mr. and Mrs. Henry B. Hazard
Thomas H. Healy
Robt. Henderson
George R. Holmes
Manley O. Hudson
Charles Evans Hughes
James D. Hull
Thomas B. Hull
William I. Hull
Prof. and Mrs. C. C. Hyde
W. H. E. Jaeger
Benjamin F. James
Hermann Janssen
Philip C. Jessup
Mr. and Mrs. H. P. Judson
Thorsten Kalijarvi
B. Kazemi
Robert F. Kelley
Maj. and Mrs. Archibald King
Mr. and Mrs. H. T. Kingsbury
Miss Ruth O. Kingsbury
Baroness von Koskull
Mr. and Mrs. Robert Lansing
Mr. and Mrs. C. H. LeFevre
Mr. and Mrs. Howard S. LeRoy
Mr. and Mrs. K. von Lewinski
William E. Linden
Ralph R. Lounsbury
Ago Maltzan
Miss Evelyn Marquette
E. A. Mathis
Mr. and Mrs. R. N. Matson
Fenton R. McCreery
Mr. and Mrs. C. J. McLeod
William McNeir
Mr. and Mrs. Marshall Morgan
Farag Moussa
Mr. and Mrs. Henry Necarsulmer
Charles W. Needham
R. T. Newman
Fred K. Nielsen
Charles Oakes
Frederic A. Ogg
Robert P. Parrott
J. F. Peake
Marc Peter
Mrs. George R. Putnam
Jesse S. Reeves
Henry M. Robinson
William L. Rodgers
W. A. Rogers
L. J. Rosenberg
Leo S. Rowe
Mrs. Lindsey Russell
Baron von Schenk
Mr. and Mrs. James Brown Scott
Judge Kathryn Sellers
Charles L. Seya
Mr. and Mrs. James R. Sloane
S. P. Smith
Mrs. Blanche Pogue Smith
William Walker Smith
Nicholas J. Spykman

Mr. and Mrs. O. M. Stanfield
Mr. and Mrs. Theodore Stanfield
Mr. and Mrs. Thomas L. Stitt
Mrs. Stokes-Hackett
Prof. and Mrs. E. C. Stowell
Mr. and Mrs. John Q. Tilson
Mrs. W. G. Townes
Edgar Turlington
William R. Vallance
John E. Vance, Jr.
Mr. and Mrs. L. E. Van Norman
Dr. J. Varela
Madame J. Varela
Hector Velarde
Hernan Velarde
Prof. and Mrs. Eugene Wambaugh
Mangum Weeks
George T. Weitzel
James R. Wick
George W. Wickersham
J. Everett Will
V. F. Williams
George Grafton Wilson
Mr. and Mrs. F. C. de Wolf
Mr. and Mrs. Paul Wooten
Herbert F. Wright
Mr. and Mrs. J. Butler Wright
Edward C. Wynne
Clarence Young
J. Edwin Young

The TOASTMASTER (Hon. Charles Evans Hughes). I will ask Dr. Wilfred T. Grenfell, Missionary Bishop to Labrador, to invoke the divine blessing.

Dr. GRENFELL. Almighty God, Thou who makest laws that need no alteration and that cannot be broken with impunity, we ask Thee to guide the deliberation of Thy children in the service of the work which is under discussion during these days. We pray Thee to hasten the time when the kingdom of righteousness and joy and peace shall be made possible by all men having in their hearts the divine law that we should love our brother as ourselves. We ask it in the name of Christ. Amen.

The TOASTMASTER. Ladies and gentlemen, will you rise and drink the health of the President of the United States? (The toast was drunk.) And now may I ask you to drink the health of the Chiefs of the States whose representatives have honored us with their presence this evening? (The toast was drunk.)

The TOASTMASTER. Ladies and gentlemen, I have been assuring some of our perturbed friends that this is a restful and an entirely informal occasion. We have finished most agreeably the Twentieth Annual Meeting of the American Society of International Law. I find among our distinguished guests some doubt as to the exact object of this Society. I hasten to assure them that it belongs to a group which has relatively few members. It is distinctly a learned Society. It is not devoted to propaganda. Most organizations are for the purpose of committing you to something that you know nothing about. This Society commits none of its members to anything. There is no secretary to go before legislative committees to assure them that hundreds and thousands of fellow-citizens whom they represent,

duly organized and expressing their views voice the demands for which the secretary speaks. We discuss, but never decide. The only resolution that we have is the resolution not to resolve. If we did decide, with the equipment of learning that our membership enjoys, undoubtedly we should decide rightly, but the danger might be, as Fox said of Burke, that we might be right too soon.

You may be interested to know, as one of our friends here was desirous of knowing, what we have been talking about during our meetings. I told him that we had been discussing chiefly the codification of international law; that we had fortunately hit upon a subject which we thought would keep us occupied so long as the Society endures; that we had shown our appreciation of the difficulty of the task, and also our optimism in addressing ourselves to such a topic with any sort of confidence, in taking up, as the principal subject for discussion dual nationality. Here is one of the grave injustices of the world. It appeared in the course of the discussion that a man who had not been sufficiently mindful of his responsibilities even to get married might have two or more countries, whereas a woman who had dutifully selected a mate might have no country at all. We reflected upon the extraordinary exhibition of the first efforts of feminine independence in securing a system so carefully contrived that women achieving this independence found that they had achieved it at the expense of all national relations. We have had great joy, while we were contemplating, as we do, of course, as philosophers and jurists, the possibility at some time of an agreement among all the nations on this subject, in considering the oddities which the present conditions present.

It is not my desire tonight to intrude upon your attention any serious topic, but rather to introduce to you those who have done us the honor of coming here to meet with and to speak to us. I make that distinction advisedly, because I was able to secure the acceptance of our invitation on the part at least of two of our most distinguished guests by a very definite assurance that they would not be called upon to speak. You know, for example, that the Vice-President is a silent man in a tumultuous world. Someone defined true eloquence as made possible only under conditions where one could be unembarrassed by facts, unrestrained by occasion, and unlimited in time. Without mentioning the forum where these conditions obtain, it possibly would be easy for you to picture the great opportunity for the observation of prolixity that our distinguished guest enjoys. We have a particular gratification in welcoming him here because he represents the basis of all our hopes. He represents, and his name forever will be associated with an economic adjustment which underlies all possibilities of peaceful relations in Europe. There is only one real pipe of peace, and that is the Dawes pipe. It was smoked so successfully in Europe that we hope for conditions of constantly increasing prosperity among those who were sadly vexed by problems that seemed insoluble until they were disposed of through the aid of that instrument of peaceful adjustment.

I promised the Vice-President that he would not be called upon to speak, and I am not going to call upon him to speak. I am merely giving him the opportunity!

Address by the Honorable Charles G. Dawes

Vice-President of the United States

Mr. President, ladies and gentlemen: The President of your association having been a party to an agreement that I should not be called upon to make a speech, tells me that while I am to make some remarks I am not expected to say anything. This method of speaking is somewhat prevalent in Washington, and I fall into it readily. Your distinguished President has been talking to me about some of the subjects which you have been discussing during the past week, and his explanation of them recalls the saying of Lord Balfour. The latter, after stating an abstruse philosophical problem, gave Kant's explanation of it and then said: "It may be regarded that with the generality of people they much prefer the existence of a problem which can not be explained to an explanation of it which they can not understand." Expecting from your speakers addresses upon subjects which call for most thoughtful consideration, you will excuse me when I limit what I am to say to an expression of my pleasure at being with you, and to a word about your distinguished president, Honorable Charles Evans Hughes.

I think no man of this generation has ever left public life who enjoyed a higher degree of public esteem than Secretary Hughes. To the complicated question of our post-war international settlements he brought a mind singularly clear and direct in all its methods of expression. A case is often won or lost on the first statement of it.

The great address of Secretary Hughes at the opening of the Washington Conference for the Limitation of Armaments was a happy example of this truth, and it is a constant source of regret to me in the discussion of international settlements now in progress in Washington that we miss the comment of our distinguished and trusted authority.

It has been a pleasure for me to be with you. I now leave the field to Baron Maltzan and the Minister of Uruguay.

The Toastmaster. The German Ambassador has done us the honor of coming here also under the agreement that he should not be called upon to speak. I am not going to call upon him to speak. We are especially delighted in having him with us, representing, as he does, the new Germany, the Germany of peace, of industry, and of prosperity. Let us remember that the acceptance by Germany of the Dawes Plan was the first step toward an enduring peace in Europe, and that the agreements of Locarno, which we hope will become effective, resulted from the proposals made by the Reich. The German Ambassador!

Address by Baron Ago Maltzan

German Ambassador to the United States

Mr. Vice-President, Mr. Chairman, ladies and gentlemen: Your Chairman was quite right when he told you that I had asked him to permit me to come here without being called upon to make a speech, and that he promised me not to call upon me. He has kept his word, and I hope you will allow me also to try to keep mine and not make a formal speech, but to address you quite informally.

When I came here this evening I felt very happy and light-hearted, thinking as I came to the assembly of the American Society of International Law that it would take me back to my old student days when I could enjoy myself without making any speeches, but listening quietly to the wisdom of learned scholars. Your Chairman, however, has brought it vividly back to me that I am not here as a student, but as an ambassador, that I must not dream of the past, but do my duty in the present. This information came rather as a surprise to me, but I hope that the disappointment will not be on your side.

There is yet another reason why I should not make a speech this evening. The fact is: I am drunk—yes, really drunk—with the intoxication one feels continually in this marvelous country with its ever increasing interests and pleasures. On my early morning trips I am exalted with the beauties of your wonderful Rock Creek Park, with the joyous singing of the birds, the flowers bursting forth in their first clothes of spring and the quiet murmuring of the brook. On coming home at nine o'clock in the morning I usually get my second "kick"—but this is in confidence, and I hope you will not give me away by making any unfavorable reports to my Government about it. On coming home I always find a lot of papers and magazines on my desk and I am inspired by the spirit I get from the American press. Some of my greatest inspirations come to me from the postscripts of a certain Mr. Brown, who always gives the most advanced information about the secrets of American politics.

The magazines are also not lacking in inspiration. With special interest I read *Foreign Affairs*, in which Professor Coolidge, whom I have the pleasure of seeing here tonight, gave me the best opportunity to learn what I should do and, much more sometimes, what I should not do. This is of considerable help to me in making my reports to the Wilhelmstrasse. I owe you, Mr. Coolidge, my most grateful thanks for all you did in this way for my political education.

Sometimes another magazine also gives me some kind of "kick," but I am not sure whether I could mention that magazine here without being accused of moral turpitude. I mean Mr. Mencken's *American Mercury*, from which one often can obtain rather a good tonic.

There are a good many other papers to which I am indebted for my

usual daily inspirations, all of which I cannot mention here. In order to recover from all these strong drinks, which I might easily call paper cocktails, I generally take a little walk around your impressive city with its wonderful monuments and buildings. When I come to the Lincoln Memorial I am again filled with admiration in seeing this symbol of unity and of united strength, which has recently thrown some of its great shadow even across the sea to the small city of Locarno, and near to it the George Washington monument, this monument which is so strictly American, symbolic of American character, clear and strong and rising to the sun.

Then comes the afternoon and evening with its many various duties, but this evening I am fortunate in finding myself in your company at the dinner of the American Society of International Law. I hope that you will not be astonished, but that you will understand now that I am drunk—intoxicated with the pleasure of being amongst you and hearing the inspiring addresses which have just been delivered by your Chairman, Mr. Hughes, and by Vice-President Dawes. Perhaps some of you were uplifted like me or perhaps you are more accustomed to this sort of American spirit than I have been up to now. I really was very happy to hear again the well-known sound of the voice of our Vice-President—I say "our" Vice-President because the name of Dawes belongs not only to America, but also to Europe and especially to Germany.

But even with the dinner, my day is not always finished. My Brazilian colleague, who is nowlooking at me, will this time quite agree with me, I am sure, when I say that later, when the "moonshine" comes and the dancing begins, we both are often intoxicated by the beauty and charm of the American ladies.

You see I was not wrong when I hesitated to talk to you, but even this intoxication of which I spoke to you is vanishing in view of two things which again overwhelmingly impress me tonight. One is the enormous American hospitality which you offer to all foreign diplomats. In my whole career I have never seen such great hospitality as here. The second feeling which impresses me so deeply tonight, especially as a German, is to be here again in the company of two great men, Mr. Hughes and—I will not say Vice-President, but—General Dawes. These two men were the first, Mr. Hughes in his capacity as Secretary of State and General Dawes as Chairman of the famous Commission of Experts, who came to Germany after the war as friends, to give us help. This never will be forgotten at home, and I wish to thank both again for what they have done for my country.

The TOASTMASTER. Now I may advise you that I am through with my commitments, and from this time on it is "regular order."

It is very appropriate that we should have the pleasure of hearing the next speaker of the evening. We have had recently a most agreeable visit of the journalists of Latin America, a visit which emphasizes a point with

reference to our relations in this hemisphere which should never be overlooked. We talk so constantly of the opportunities of trade, of the development of mutual beneficial commerce, that we are apt to forget the cultural contacts which are even more important. International lawyers never fail to recognize the eminence of the jurists of Latin America, whose works they have studied, and to whose contributions to the development of the science of international law they feel constantly indebted. If others of our people are unmindful of the culture of the people of the great States to the south, it is never the international lawyer.

At this session of our Society we welcomed Dr. Bustamante, member of the Permanent Court of International Justice, who did us the honor of coming here from Cuba to address the Society with respect to the work that has been done under the auspices of the American Institute of International Law in presenting projects of codification to the Pan American Union, which in turn is sending them to the governments for the instruction and aid of their representatives at the Conference of Jurists to be held in Rio.

We feel that in this sphere of effort we are very closely related to our brethren of the other States of this hemisphere,—our sister American Republics. There is one of those States, not very large, but very choice, whose distinguished representative is with us tonight—one whom we always are glad to hear—the Minister from Uruguay, Dr. J. Varela.

Address by Dr. J. Varela

Minister from Uruguay to the United States

Mr. President, Mr. Vice-President of the United States, ladies and gentlemen: I know you have conferred upon me this coveted honor of addressing you owing to my station of more than six years on the pleasant banks of the Potomac. I have seen seven times the cherry blossoms at Washington. Who dares to say that diplomats are "nomads"? Certainly they are "nomads" when they remain here to enjoy the charm of your life and to serve peace and understanding, but they are touched with a spark of madness if they leave too soon or when promoting strifes and conflicts.

When I have the privilege to contemplate such an imposing gathering of prominent men and women devoted to international law, I realize how futile is the contention of skeptics that international law is only a dream. This assertion is more often heard in Anglo-Saxon than in Latin peoples, certainly not because you have less confidence in high principles governing human relations, but curiously enough because your rich and magnificent language lacks a proper word. Nobody denies here the existence in international affairs of what the Romans called *jus*, but many believe that the absence of specific sanctions in this field forbids us to speak of a true international *lex*. I am not looking very ambitiously when I request from your

learning not a new reverberating principle, but merely a word, an English expression corresponding to our Spanish *derecho internacional.*

I know you have the power to decree a new word and even a new conception to international law. I appreciate the extent of your influence, the prestige and importance of your meetings, and I would have longed for the honor of addressing you were it not for the difficulties and perplexities of the task. I am not referring to my own shortcomings, great as they are, but especially to the limitations incident to every diplomat, although when they have great capacity they are able to overcome them, as we have witnessed tonight in hearing the distinguished Ambassador from Germany.

Notwithstanding, the fact remains that a diplomat is not expected to comment on domestic policies or questions, a province reserved to the American citizen. It happens to be our misfortune that the domains of domestic and international policies and international law are concentric, but not clearly delimited. What is domestic here is reputed abroad as international. The same uncertainty prevails as for the cynics in morals and for the snobs in fashions. Expediency on this side of the equator is sacred principle on the other. To increase our embarrassment, we remember that great nations have a tendency to enlarge the field of the domestic jurisdiction, restricting the domain of the international one,—a very understandable and even laudable fact when, as in your case, the greatness is coupled with fairness and justice. To the same benefit of an enlarged unhampered domestic jurisdiction small nations, too, have a right, but only when they have won the respect of the world by their moral standard and righteous conduct. If they have their house in order and protect those rights of liberty and property, for nationals and foreigners alike, without which chaos and anarchy result, they are entitled to the respect of all and have the privilege to reject any arbitrary intervention from outside.

If I claim always for my nation consideration for our rights, it is because we are an organized community who respect the rights of others. True democracy exists in the Republic of Uruguay. Government of the people and by the people is a fact recognized by all the citizens of my country. Our constitutional system is a creation of our own. We have our dress ordered to measure and not, as formerly in American fashion, too big for us. We are good and faithful disciples of Americans, inasmuch as we have learned from them to develop our personality without prejudice and hindrances. Time and experience will tell if we have been wise. We have organized what we believe is social justice for all classes, protection to property and to labor, sound money, and as a complement in the external field, arbitration for international disputes inscribed in the Constitution of the country. It is not a dead precept, and I think a society of international law would be interested in knowing that Uruguay is perhaps the very nation which has concluded more treaties of unrestricted arbitration than any other in the world. It is a national principle, very wise for a small nation equal to

anyone in the realm of justice, but second to many in might. We have succeeded in celebrating treaties of arbitration providing that all controversies of whatever nature which for any cause whatsoever may arise must be submitted to arbitration, when they cannot be settled by means of direct negotiations. Those treaties have been concluded not only with a great number of Latin American Republics, including Brazil, but with European nations, like Spain, France, Italy, Great Britain, and others.

Opinions may differ regarding the value of such international agreements. Personally I believe they are a great asset for a small nation. This is not a time in which international conventions conceived in liberty and not imposed by force could be disregarded without shame and punishment. I think history confirms and not disproves this contention. If treaties were a worthless thing, as some skeptics believe, why so great reluctance and hesitation in concluding them, especially conventions of unrestricted arbitration? Why should Uruguay be almost an exception in having secured such diplomatic promises from several of the greatest nations of the world? Whatever may be the practical significance of such instrumentalities, their moral import is unquestionable. When nations like Great Britain and France and Italy and Spain and Brazil, who have large interests in Uruguay, agree that any question with us, be it of money or territory, even of national honor, without exception, ought to be submitted to impartial arbitration and not solved by force, those nations I believe render a tribute to the fairness and probity of the people of Uruguay.

With the United States we have not, and nobody has, that kind of unrestricted conventions. Your system and characteristic treaty-making power tend to other solutions, but, notwithstanding, your contribution to international arbitration is unsurpassed, both when you participated as actors or when with splendid effort and counsel you helped others to solve threatening problems of national significance by amicable understanding. South America will never forget your assistance. Gratitude, we hope, is more lasting between nations than among men. Without model treaties, you have been at times the most powerful and helpful friend of our Republics. If anybody doubts it, he could read a recently published book, eloquently prefaced by one of your most distinguished members, Dr. Brown Scott, containing the diplomatic correspondence of the United States concerning the independence of the Latin American Republics. Coöperation, lofty ideals, true brotherhood, appear in its pages. Your statesmen and diplomats of the time are entitled to the gratitude and admiration of all Latin America for their magnificent conviction regarding the complete independence of the then struggling colonies.

Since those epic times more than a century has elapsed and witnessed invariable friendship. We greatly appreciate your determination who helped us in our struggles to conquer complete independence and to take a place among the sovereign nations of the world.

Your efforts and ours, in different ways and proportions, have contributed to the development of international law. We have inherited a Latin predilection for formulas and written agreements. Although I personally recognize that other ways of advancement are equally effective, it is proper to say that great progress towards solidarity between the Americas will be made the day in which some common principles may be established. For that reason I look with interest to the meetings next year at Montevideo and Rio de Janeiro which will endeavor to begin the codification of international law for the Americas. Several conventions have been prepared by able minds, but what is needed is enlightened leadership, a sparkle of that dynamic force and masterful eloquence with which the President of this Society, Mr. Hughes, then in public office, animated and inspired the memorable conference of Washington on the Limitation of Armaments.

I am certain that your eminent Secretary of State, Mr. Kellogg, whose splendid services to Pan Americanism we highly appreciate, will dedicate his energies to the preparation of those positive processes of international coöperation of which he spoke last week before a representative gathering of journalists. If our hopes of closer understanding are realized, the Americas will have served their self-interest and set an example to the world. Then, the heralded new spirit of Europe and the traditional spirit of America will unite in furthering peace and civilization for the benefit of mankind.

I thank you.

The TOASTMASTER. In past years the despair of those who have sought to promote a better understanding among peoples has been the ignorance and lack of interest on the part of so many of the public as to our foreign relations. I heard of someone who asked a young lady whether she had read "The Kentucky Cardinal." She said no, that she was not interested in ecclesiastical history. "But" said her friend, "This cardinal was a bird." "Oh," she said, "I do not care anything about his private life." We have had something of that lack of interest on the part of a great many in relation to foreign affairs. But in recent years there has been an extraordinary competition in organizations to promote the diffusion of intelligence, or at least information, with respect to foreign relations.

Many, many years ago, when I was trying to teach international law at Cornell, at the beginning of the term I stood at the station and saw a great express wagon, such as we used in those days, piled high with the trunks of the returning students. Knowing the driver, I remarked, "You have quite a load there." "Yes," he said, "Eddication is a moighty foine thing, but there's too many goin' into it." In the Department of State I think it may sometimes be felt that there is a generous provision of voluntary advisers!

But there is one source of information which is most highly valued. I think it is the most important contribution that has been made in this country to a good understanding of foreign affairs. That source is the periodical

entitled *Foreign Affairs*, which is the very best, if I may say so, of all the periodicals that we have in this country dealing with that subject. It is our privilege tonight to have as a guest the editor of this periodical, our instructor, philosopher and friend, Mr. Archibald Cary Coolidge!

Address by Professor Archibald Cary Coolidge

Harvard University

Mr. President, ladies and gentlemen: After the discreet but very obvious warnings that I have received from your presiding officer and from the Vice-President that I must make my speech a short one, you need have no fears on that point. I understand the meaning of their remarks and shall try to act accordingly. I may say that I have an additional reason for making my speech short in that having forgotten to bring my glasses, although I have borrowed those of a colleague, I am sure I shall miss all of the best points in the notes which I had prepared beforehand.

For a good many years I have had the honor of being a member of the American Society of International Law. To tell the truth, my main object in joining it was to conceal from the outer world my complete ignorance of the subject. But in spite of the years that have passed, I am afraid my ignorance is still very considerable. As a member and with this outside advantage, I have studied and admired the work of the Society. I have tried to understand what it stood for and on what principles it was based. Needless to say, I rejected at once the cynical explanation that it was merely to try to lay down rules of the game just as one does for any other, quite regardless of whether the game is good or bad.

On the contrary I look on the Society of International Law as a highly ethical institution. I admit, as the Uruguayan Minister has pointed out, that we suffer much from the fact that in English we have no word to distinguish "right" from "law" in the more usual sense of the term. In other European languages the word used is the same as the one for "right", Spanish *derecho*, French *droit*, German *recht*. So that our ethical object is partly concealed under the too great inclusiveness of the term which we have to use. At the same time I think we may claim that international law is based on the Golden Rule, based more directly indeed than are many other sciences. We are fortunate, for instance, that we do not have to take up such particularly cruel doctrines as survival of the fittest and other things of the kind.

Another characteristic of international law, or a rather interesting fact in its history, is that though there have been many violent disputes on what we might call questions of law or right among nations, on the whole they have led in very few cases to any great war. The subject itself is, to be sure, a contentious one, the disputes it has engendered have been violent, and again and again the world has been on the edge of war owing to disputes of this

kind. Let me refer to a comparatively recent case. In our own Civil War we came near to having a war with England, a war which would undoubtedly have affected very gravely the whole history of the American Republic, owing to a question as to whether an American captain had a right to take Messrs. Mason and Slidell off an English steamer. Fortunately we gave in in time on that point and the war was averted. Or, it may be said that in the case of the World War certain crucial questions like that of the neutrality of Belgium or that of unlimited submarine warfare belong to the broad domain of international law. But there is a good deal more to both of these questions than the mere legal side, and the general statement still holds that among the great causes that have made for strife and war in mankind, disputes relating to our subject have seldom led to disastrous results. They have not arrayed people against each other as have, let us say, economic or nationalistic ones. They are fortunately, even when a matter of national honor is involved, susceptible to arbitration in nearly all cases. This is a thing which we can look upon with decided satisfaction.

Another feature of disputes turning on international right is that they are aboveboard. There is no reason, or no fundamental reason, why they should be complicated with motives of sordid interest on one side or the other. They may be affected by passion, by prejudice, by ignorance, by bigotry, and by other such considerations, but the sordid element seldom enters into them. In questions of international law, we can stand boldly and frankly for the principle of open covenants openly arrived at.

There is, however, another side to this matter of open covenants which perhaps does not come into the domain of law, but which I think all who are interested in international questions and international relations would do well to bear in mind and give some of the best of their thinking to. At the present day there is great reaction throughout the world against what has been termed secret diplomacy. This reaction has been much stimulated by the whole story of the World War, by the discovery of the so-called Secret Treaties which more or less limited the freedom of nations as well as of governments. To be sure, it has not always limited them. In the World War more than one Power went in on the side to which it had not been previously allied. Still the feeling is strong throughout the world that there is something wrong in the possibility of a few people, by secret covenants, disposing of the lives and welfare of countless millions of their fellow-citizens. Modern democratic mankind has a right to be consulted in the great questions which determine its fate.

On the other hand, I think we have all of us got to try to appreciate as clearly as we can just what publicity is desirable and is possible under existing circumstances, and what things still may be kept quiet and not told to the public until decisions of some kind, of at least a provisional nature, have been arrived at. What is the state of the case today in international discussions? The modern democratic world expects to know about what is going

on. It expects usually to get information in the form of sensational headlines. It often does not go any further than that, and is thus fed on highly seasoned, highly spiced news that naturally affects its reasonable judgment.

We have also got to face the fact that in these days, the representative of a free people in a free congress or parliament, feels himself free to criticise foreigners with the same frankness, the same violence, and in some cases, we might say, with the same nastiness which he applies in dealing with the members of the opposite party in his own country, or even with the members of his own party with whom he happens to disagree at the moment. This is a game at which all can play and at which all do play. The worst things that have been said are naturally picked out and telegraphed abroad. We may expect equally unpleasant things in return, with the result of anger and feeling on both sides. It is part of the price we have to pay for modern civilization, for the spread of news by means of quick communication, for modern democratic freedom of speech and recklessness in talking, no matter whose feelings may be hurt—talking sometimes for home consumption, but the thing said for home consumption may naturally and inevitably get abroad, often in an injurious way. In the old days when we twisted the Lion's tail, it took at least some weeks before the roar of his growls came back to us, and it gave a chance for people to look at the situation more coolly. At present the results are pretty nearly instantaneous. It has been said with some truth that if the Atlantic cable had existed at the time of the Mason and Slidell episode, the chances are we would have had war between England and the United States practically at once. The Atlantic cable has come, and come to stay. But we recognize that there were certain advantages in the past when it did not exist.

In this tendency to treat everything publicly, people are little apt to think of the details of a discussion or a negotiation as also belonging to the public. Yet everyone knows that when it comes to matters of detail, they can only be handled efficiently by a small group, and if anything is to be accomplished, the news of what is going on should not be prematurely revealed. A man in a committee should speak to the people with whom he is arguing and not with an eye to the gallery and the general public. He may in the course of his arguments have to assume a position from which he can retire after discussion, but which it would be dangerous to have get at once to the outside world, for this would tend only to inflame passions when calmness is most desirable. It may be questioned if the convention that made the Constitution of the United States had had all its discussions promptly reported, and commented on by the newspapers, and if each delegate had been exhorted by his constituents to stand firm for the rights which he had so eloquently defended, whether the convention would ever have agreed at all and whether we should have the United States in its present form.

Of course we here assembled know that in the discussion of many important affairs, although the general public should have the right to judge of

them afterwards, the details must be settled more or less in camera under a democratic system as well as any other. The phrase "open diplomacy" is a very pleasant phrase. It represents a high ideal. It represents a rule of conduct which should be followed as much as possible. We might say that "open strategy" prevailed in the days of chivalry, but the days of chivalry are gone. We are all of us more or less sophisters and calculators, whether we will it or not. We have to handle the great questions that come before us through the men we have chosen. We should stand behind our people unless they have given us cause to doubt their word and doubt their action, and in a government like ours there is no reason to fear lack of due criticism. Of course, every governmental machine, especially every foreign office and diplomatic service, has at times a certain temptation to take itself too seriously. It is human to be pleased at having inside information, and we are rather apt to put on airs of superiority when we do, airs that may be irritating to people outside. But this danger is after all one that has never been easier to watch than at the present time. I believe that we want to keep in mind the absolute necessity that much should be left to those in whom we trust. It will often happen that all we can do until we know the result on any given question is to have confidence in our representatives whose ideals are the same as our own. While standing up, as we know they will, for our rights, may they also stand for the principle of the Golden Rule which, as I said, seems to be the principle of the American Society of International Law.

The Toastmaster. Expressing on your part our gratitude to the distinguished gentlemen who have instructed us, charmed us, and inspired us, it is my privilege to declare the Twentieth Annual Meeting of the American Society of International Law adjourned.

MINUTES OF THE MEETING OF THE EXECUTIVE COUNCIL

Friday, April 23, 1926

The Executive Council of the American Society of International Law met at No. 2 Jackson Place, Washington, D. C., on Friday, April 23, 1926, at 4.45 o'clock p. m.

The Honorable Charles Evans Hughes, President of the Society, presided.

Present:

Chandler P. Anderson	Charles Cheney Hyde
Hollis R. Bailey	Harry Pratt Judson
Charles Henry Butler	Howard Thayer Kingsbury
Edwin D. Dickinson	Fenton R. McCreery
George A. Finch	Fred K. Nielsen
Charles Noble Gregory	William L. Rogers
Manley O. Hudson	James Brown Scott
Charles Evans Hughes	W. W. Willoughby
William I. Hull	George Grafton Wilson

A cablegram from Mr. W. C. Dennis was read expressing regret that his absence in Arica on public business prevented his attendance at the meeting. A letter was presented from Mr. Frank E. Hinckley regretting that professional engagements in San Francisco prevented his attendance at the meeting.

The minutes of the meetings of April 24 and 25, 1925, which had been printed in the PROCEEDINGS, were approved as printed and their reading was dispensed with.

The Treasurer was absent on account of serious illness in his family, and his report was submitted and read in summary form by the Recording Secretary, who also presented the report of F. W. Lafrentz & Company, Public Accountants, upon their audit of the Society's accounts for the year ended December 31, 1925, which showed that the accounts were in proper condition.

The reports of the Treasurer and Auditors were received, approved and ordered to be filed.[1] A statement by the Treasurer in regard to the investments of the Society was also presented and read by the Recording Secretary. In this statement, the Treasurer recommended that he be authorized to reinvest these funds in securities paying a higher rate of interest, and further that he be authorized to invest the fees from life memberships, now on deposit in a savings account. The Treasurer submitted a list of proposed securities in which the Society might invest. After consideration, the Executive Council adopted the following resolution:

[1] Printed *infra*, pp. 178–180.

Resolved, That the Treasurer be, and he is hereby, authorized to invest in securities the cash received from life membership fees, now on deposit in the Society's savings account, and to reinvest in securities paying a higher rate of interest the two thousand five hundred dollars ($2,500) now invested in Central Pacific Four Per Cent First Mortgage Bonds and the five thousand dollars ($5,000) now invested in United States Third Liberty Loan Bonds.

The Recording Secretary made the following report upon memberships in the Society and subscriptions to the AMERICAN JOURNAL OF INTERNATIONAL LAW for the year ended December 31, 1925:

New annual members		99
Resignations	15	
Died	20	
Dropped for non-payment of dues	32	67
Net gain		32
Total Annual Membership		1,041
Honorary Members		4
Life Members		25
Total Membership		1,070
New Subscribers		111
Discontinued		49
Net gain		62
Total Subscribers		937

The Editor-in-Chief of the JOURNAL reported that the JOURNAL had been issued regularly during the year and that the slight delays which had occurred in the publication had been due to congestion in the printing office and not in the editing. He stated that he would be glad to receive any suggestions from members of the Council regarding the JOURNAL, and Admiral Rogers suggested the advisability of devoting more attention to the subject of diplomacy.

The Chairman of the Committee on Selection of Honorary Members reported that the committee had considered the question of recommending an honorary member, but had decided that under present conditions it is inadvisable to recommend any person this year. The report of the committee was received and approved.

The Chairman of the Committee on Increase of Membership presented a written report, dated January 8, 1926, which was read and ordered to be filed. From the report it appeared that, after considering various methods of increasing the Society's membership, the committee had prepared a selected list of persons to whom invitations should be sent. It further appeared that the invitations had been issued and a number of new members had thus been added. In addition to his formal report as chairman of the

committee, Mr. Kingsbury recommended that invitations to join the Society be sent to all professors and instructors in international law and cognate subjects in the various law schools, colleges and universities, to the judges in the principal courts in the various states and the District of Columbia, and to the federal judiciary generally; to the staffs of the State Department, the Department of Commerce, the War Department and the Navy Department; to the officers of the Judge Advocate General's Department stationed in Washington; to the officers and governing committees or other governing bodies of the various bar associations; and to the members of the Committees on Foreign Affairs of the Senate and the House of Representatives. These suggestions of Mr. Kingsbury were likewise approved, upon motion duly made and seconded.

The Chairman of the Committee for the Extension of International Law reported that the committee had no report to make.

The chairman of the Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law reported orally that, owing to the absence of a majority of the members of the committee in Europe last summer, it had been impossible to prepare the report of the Council, as requested in the committee's report approved by the Council on April 25, 1925; that the committee had met during the present meeting of the Society and considered the reports recently issued by the League of Nations Committee, and the Chairman recommended, on behalf of the committee, that these reports be printed *in extenso* as soon as possible in a supplement to the AMERICAN JOURNAL OF INTERNATIONAL LAW so as to give them the utmost publicity for purposes of discussion. The Chairman further recommended that his committee be continued and instructed to give consideration to topics of international law which seem to be appropriate for codification and report its conclusions to the Council with a view to their eventual transmission to the League of Nations Committee as the recommendations of the American Society of International Law. After discussion, it was, upon motion, decided that the recommendations of the committee be referred to the meeting of the Council to be held on April 24th.

Mr. Charles Henry Butler reported the death on August 7, 1925, of the Honorable George Gray, a Vice President of the Society. Upon his motion, the Council expressed its deep sense of loss by the death of Judge Gray and its sympathy with his family, and directed that an appropriate memorial to be prepared by Mr. Butler be inscribed in the minutes of the Council.

Mr. Hollis R. Bailey then moved the adoption of the following resolution:

> *Resolved*, That the time has now come when the Society may properly adopt resolutions and create a committee on legislation to formulate bills to be introduced in Congress after the same have been approved by the Society.

After discussion, it was, upon motion, ordered that the resolution be referred to the Council at its meeting on April 24th.

Miscellaneous business then being in order, the Recording Secretary presented a report signed by Messrs. Charles Cheney Hyde and Arthur K. Kuhn, appointed by the President to represent the Society at the annual meeting of the American Council of Learned Societies, for the purpose of discussing the proposal of the Royal Academy of Science at Amsterdam for an encyclopedia of international law. The report called for no action by the Society, and it was received and ordered to be filed. In this connection, the Recording Secretary also presented a letter of February 16, 1926, from the Executive Secretary of the American Council of Learned Societies, expressing appreciation for the appointment of delegates to the Council to discuss the foregoing matter, and expressing the hope that the relations between the Council and the Society may become closer.

The Recording Secretary then presented a letter of December 23, 1925, from the Director General of the Pan American Union transmitting an invitation to the Society to be represented at the Pan American Congress Commemorative of the Bolivar Congress of 1826, which is to be held in Panama June 18–25, 1926. After consideration, the Recording Secretary was requested to reply expressing thanks for the invitation but stating that it is not the practice of the Society to be represented at meetings in foreign countries.

Whereupon, the Executive Council at 6:25 o'clock p.m. adjourned, to meet on the following day immediately upon the adjournment of the Society.

GEORGE A. FINCH,
Recording Secretary.

TREASURER'S REPORT

January 1 to December 31, 1925

PRINCIPAL ACCOUNT

January 1, 1925. Balance on deposit in Union Trust Company	$994.86
May 29, 1925. From Income Account (one life membership)	100.00
December 31, 1925. Balance on deposit in Union Trust Company	$1,094.86

INCOME ACCOUNT

Receipts

Membership dues:			
1924	$277.00		
1925	5,071.92		
1926	218.75		
		$5,567.67	
Subscriptions:			
1925	$2,090.75		
1926	2,472.83		
1927	10.00		
		4,573.58	
Foreign postage		323.14	
Proceedings:			
1924	$113.10		
1925	915.70		
1926	139.20		
		1,168.00	
Back numbers:			
Journal	$615.74		
Proceedings	233.75		
		849.49	
Analytical Index		55.80	
Interest:			
Liberty Bonds	$212.50		
Central Pacific Bonds	100.00		
Deposits:			
Union Trust Company	30.61		
Riggs National Bank	49.68		
		392.79	
Banquet		1,240.00	
Binding		117.00	
Sale of reprints		93.11	
Exchange		1.72	
Miscellaneous		61.01	
Total receipts		$14,443.31	
Bank balance, January 1, 1925:			
Riggs National Bank		67.34	
			$14,510.65
Total of Principal and Income Accounts			$15,605.51

Disbursements

Salaries:			
Managing Editor	$1,800.00		
Clerks	660.00		
Treasurer's account	300.00		
Proof reading	160.00		
Preparation of Chronicle	100.00		
		$3,020.00	

Journal:			
Preparation	$47.60		
Printing	6,369.17		
Mailing	304.46		
Back numbers	252.27		
Off-prints	249.67		
Miscellaneous	33.56		
		$7,256.73	
Annual meeting:			
Printing and postage	$58.00		
Reporting	157.00		
Banquet	1,434.25		
		1,649.25	
Proceedings:			
Preparation	$1.44		
Printing	1,153.35		
Mailing	82.77		
		1,237.56	
General expenses:			
Stationery and postage	$240.19		
Telegrams and cables	1.44		
Freight and express	26.05		
Office supplies	28.17		
Binding	170.25		
Refunds	9.00		
Miscellaneous	173.16		
		648.26	
Transferred to Principal Account		$100.00	
Total disbursements			$13,911.80
Excess of receipts over disbursements			$1,693.71

ASSETS

Investments:			
5 Central Pacific 4 per cent. first mortgage bonds (cost price)			$2,405.14
5 U. S. Third Liberty Loan 4¼ per cent. bonds of 1928 (cost price)			5,000.00
Cash:			
Union Trust Company (Principal Account)		$1,094.86	
Riggs National Bank (Income Account)		598.85	
			1,693.71
Accounts receivable:			
Unpaid dues		$185.00	
Unpaid subscriptions		50.00	
			235.00
			$9,333.85

LIABILITIES

Accounts payable		None	
1926 Membership dues paid in 1925		$218.75	
1926 Subscription fees paid in 1925		2,472.83	
1927 Subscription fees paid in 1925		10.00	
1926 Proceedings paid for in 1925		139.20	
Balance of Treaty Series, League of Nations, fund		120.52	2,961.30
Excess of Assets over Liabilities			$6,372.55

Respectfully submitted,

LESTER H. WOOLSEY,
Treasurer.

REPORT OF THE AUDITORS

F. W. LAFRENTZ & CO.
PUBLIC ACCOUNTANTS
COLORADO BUILDING, WASHINGTON, D. C.

April 14, 1926.

THE AMERICAN SOCIETY OF INTERNATIONAL LAW,
WASHINGTON, D. C.

Dear Sirs:

We have audited your cash transactions for the year ended December 31, 1925.

Our report, including two Exhibits,[1] is as follows:

Exhibit
"A" Principal Account
"B" Income Account

The Receipts are in accordance with your records and the Disbursements are supported by proper vouchers.

At December 31, 1925, the Principal Account had a cash balance of $1,094.86 and the Income Account had a cash balance of $598.85, which amounts were on deposit in the banks.

We inspected securities called for by the records, as follows:

Central Pacific R. R. Co. 4% 1st Mortgage Bonds, par value	$2,500.00
U. S. Third Liberty Loan 4¼% Bonds	5,000.00
	$7,500.00

Respectfully submitted,
F. W. LAFRENTZ & Co.,
Certified Public Accountants,
(Formerly the American Audit Co.)

[1] These exhibits correspond with the figures in the Treasurer's report, *supra*, p. 178. They are not therefore printed.

MINUTES OF THE MEETING OF THE EXECUTIVE COUNCIL

Saturday, April 24, 1926

Pursuant to adjournment, the Executive Council of the American Society of International Law met in the Willard Room of the Willard Hotel immediately upon the adjournment of the Society on Saturday, April 24, 1926, at 11:45 o'clock a.m.

Present:

Chandler P. Anderson	Manley O. Hudson
Hollis R. Bailey	Harry Pratt Judson
Charles Henry Butler	Fred K. Nielsen
Charles G. Fenwick	Edwin B. Parker
George A. Finch	Jesse S. Reeves
James W. Garner	James Brown Scott
Charles Noble Gregory	Ellery C. Stowell
Charles Evans Hughes	George Grafton Wilson

The Honorable Charles Evans Hughes, President of the Society, was in the chair. The election of officers and committees for the ensuing year being the first order of business, the Council proceeded to the election and the following were duly elected to the respective offices and committees:

Chairman of the Executive Council: Edwin B. Parker.
Recording Secretary: George A. Finch.
Corresponding Secretary: William C. Dennis.
Treasurer: Lester H. Woolsey.

Executive Committee:

Chandler P. Anderson	Robert Lansing
Charles Henry Butler	Frederic D. McKenney
Harry A. Garfield	Ellery C. Stowell
Charles Noble Gregory	W. W. Willoughby
David Jayne Hill	George Grafton Wilson

Before proceeding to the election of the Board of Editors of the AMERICAN JOURNAL OF INTERNATIONAL LAW, the Council considered the enlargement of the Board and the amendment of the provision regarding *ex officio* members. It was decided to enlarge the Board to seventeen members and to eliminate the provision making the Recording Secretary, the Corresponding Secretary and the Treasurer of the American Society of International Law *ex officio* members of the Board. These amendments were affected by the adoption of the following resolution:

Resolved, That Paragraph 2 of the regulations adopted by the Executive Council, May 22, 1924, regarding the editing and publication of the American Journal of International Law be amended to read as follows:

2. The Board shall consist of not to exceed seventeen members to be elected annually by the Executive Council.

The Executive Council then duly elected the following members of the Board of Editors:

James Brown Scott, *Honorary Editor-in-Chief*
George Grafton Wilson, *Editor-in-Chief*
George A. Finch, *Managing Editor*

Chandler P. Anderson	David Jayne Hill
Edwin M. Borchard	Manley O. Hudson
Philip Marshall Brown	Charles Cheney Hyde
William C. Dennis	Arthur K. Kuhn
Edwin D. Dickinson	Jesse S. Reeves
Charles G. Fenwick	Ellery C. Stowell
James W. Garner	Lester H. Woolsey

Quincy Wright

Other committees were then duly elected by the Council as follows:

Committee on Selection of Honorary Members: George Grafton Wilson, Chairman; James W. Garner; Manley O. Hudson; Charles Cheney Hyde; and Harry Pratt Judson.

Committee on Increase of Membership: Hollis R. Bailey, Chairman; Cephas D. Allin; Frank E. Hinckley; and Pitman B. Potter.

Committee on Annual Meeting: Ellery C. Stowell, Chairman; Cephas D. Allin; William C. Dennis; Manley O. Hudson; Charles Warren; W. W. Willoughby; and Lester H. Woolsey.

Committee for the Extension of International Law: Charles Cheney Hyde, Chairman; Manley O. Hudson; John H. Latané; Fred K. Nielsen; Edwin B. Parker; Pitman B. Potter; and Henry W. Temple.

The Executive Council then re-elected Mr. Jesse S. Reeves Chairman of the *Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law*, with power in the Chairman to reconstruct the committee *de novo*. Chairman Reeves subsequently announced the composition of this committee as follows:

Edwin M. Borchard	Manley O. Hudson
Philip M. Brown	Philip C. Jessup
C. K. Burdick	Arthur K. Kuhn
Edwin D. Dickinson	Pitman B. Potter
Charles G. Fenwick	James Brown Scott
James W. Garner	George Grafton Wilson

Quincy Wright

The consideration of the resolution of Mr. Hollis R. Bailey referred to this meeting by the Council of yesterday was next announced in order, but Mr. Bailey withdrew the resolution from further consideration.

Mr. Reeves, Chairman of the Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law, then submitted the following report from his committee:

> Your Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law, appointed at the last Annual Meeting of this Society, was instructed as follows: To circulate a draft of a report to each member of the Council on or before September first, 1925, setting forth what in the opinion of the Committee were the subjects of international law, the solution of which by international agreements appeared the most desirable and possible of realization. The date set for the report was fixed in order that the Council might consider the report and if approved it be transmitted to the Committee of Experts for the Progressive Codification of International Law under the auspices of the League of Nations at its meeting in Geneva, which was set for November of 1925.
>
> Of the seven members appointed upon the Special Committee of your Society four were absent from the United States during the summer, and beyond the time set for the filing of the Committee's report. It was therefore impossible for the Committee to follow the exact instructions given it, and the Committee was unable to meet within the time set. The special urgency for a report having thus disappeared, the Committee did not meet for further consideration of the matter until the time of the present annual meeting. In the meanwhile however correspondence was had with reference to the consideration of topics to be suggested to be submitted to the Geneva Committee.
>
> At the present time there have been adopted by the Committee of Experts for the Progressive Codification of International Law twenty-one topics as more or less suitable for consideration, and they are as follows:
>
> 1. Nationality.
> 2. Territorial waters.
> 3. Diplomatic privileges and immunities.
> 4. Public vessels engaged in commerce.
> 5. Extradition.
> 6. Responsibilities of states for damages to aliens in person or goods.
> 7. Procedure of international conferences; the drafting of treaties.
> 8. Piracy.
> 9. Prescription.
> 10. Exploitation of marine resources.
> 11. Extraterritorial criminal jurisdiction.
> 12. Commissions rogatory in penal matters.
> 13. International corporations formed not for profit.
> 14. Domicile.
> 15. Consuls.
> 16. Most-favored-nation clause.
> 17. Revision of established classification of diplomatic agents.

18. Jurisdiction of national courts over foreign states.
19. The nationality of commercial corporations and their diplomatic protection.
20. Recognition of juridical personality of foreign commercial corporations.
21. Conflicts of laws as to sales of merchandise.

The Committee, while recognizing that each of these topics might properly be considered scientifically looking toward an authoritative statement of the law involved under each topic, it does not feel justified at this time to indicate what it believes to be the relative importance and urgency of the various topics, but does take occasion to express its conviction that those topics which fall under the general heading of private international law might well yield precedence in consideration to those topics more plainly in the field of public international law, and that priority of consideration should be given to those topics of most urgent importance and upon which it seems more likely that an agreement may be reached. The Committee has had under consideration a number of topics which it deems appropriate for transmission to the Committee of Experts at Geneva, and now recommends that the following topics be so transmitted:

1. State Succession.
2. Criteria of *de facto* recognition of new states and new governments.
3. Canons of interpretation of treaties.
4. International servitudes.
5. The civil and commercial status of aliens transient and resident.

Very recently there have been received by the Society a series of printed documents from the Committee of Experts which in the judgment of the Committee seemed to constitute scientific material of the first importance. These are reports upon the topics of nationality, territorial waters, diplomatic privileges and immunities, responsibility of states for damage done in their territories to the person or property of foreigners, procedure of international conferences, the drafting of treaties, piracy, exploitation of the products of the sea, the legal status of government ships employed in commerce, extradition, and the criminal competence of states in respect of offenses committed outside of their territory. Without in any sense expressing any opinion with reference to the conclusions reached in these various reports, the Committee recognizes their extraordinary value as scientific studies and feels that they should be given a maximum of publicity, and to this end the Committee recommends that the Society, through its President, request the Board of Editors of the AMERICAN JOURNAL OF INTERNATIONAL LAW to publish such material, and further the Society requests its President, in view of the inadequacy of the funds at the disposal of the JOURNAL, to approach some appropriate agency with the object of obtaining a subvention for the purpose of issuing a special supplement to the JOURNAL.

Further, in order that the membership of the Society may have at its disposal all of the documentary and source material recently appearing upon the general subject of codification, the Committee further makes a recommendation similar to that just made looking toward the publication of a second special supplement embracing the Report of the

Committee of the American Institute of International Law, together with the thirty-one projects of conventions drafted by the Committee of the American Institute of International Law for submission to the Pan American Conference of Jurists to be held at Rio de Janeiro in April of 1927.

The Committee takes this opportunity of expressing its belief that a sound public sentiment upon the subject of the codification of international law can be developed in no better manner than by having the scientific results of these various bodies placed in the hands of the public of this country, and we believe that as an instrument for the scientific study of international law and its popularization the American Society of International Law may well avail itself of the opportunity to render this public service.

Finally, since the list of topics appropriate for the consideration of the Committee of Experts is by no means exhausted, quite on the contrary, it would seem that the work is just beginning, the Committee further requests that the Society authorize it to continue to coöperate in every possible way with the Committee of Experts and to render reports from time to time to the Council upon the progress being made.

Upon careful consideration the report was accepted and its recommendations approved and the following resolution was adopted governing the procedure to be followed with reference to future reports of the Committee:

Resolved, That the reports rendered from time to time to the Executive Council by the Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law be transmitted to the Recording Secretary and circulated by him to the members of the Executive Council; that the said reports, together with the replies received from the members of the Council, be submitted to the Executive Committee, and that with the approval of the Executive Committee, after considering the replies from the members of the Executive Council, the said reports may be forwarded to the League of Nations Committee without further action by the Executive Council.

There being no further business, the Council at 12:45 p.m. adjourned *sine die*.

GEORGE A. FINCH,
Recording Secretary.

LIST OF MEMBERS
of the
AMERICAN SOCIETY OF INTERNATIONAL LAW*

HONORARY MEMBERS

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[*Ad*, Address; *Rem*, Remarks.]